Looking Back, Looking Forward – Rulings of the U.S. Supreme Court and Other Issues for Local Governments

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U.S. SUPREME COURT –

1. *October Term 2012*

Lozman v. City of Riviera Beach – Admiralty, definition of "vessel"

In the last issue of Municipal Lawyer we profiled the dispute between Fane Lozman, the pugnacious owner of a boxy, two story houseboat and the Riviera Beach, Florida marina which was seeking payment from Lozman for unpaid electricity bills and dockage fees. The marina sued Lozman in Federal court under admiralty jurisdiction on the basis that Lozman's floating home was a "vessel," which is defined in 1 U.S.C. § 3 as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Under admiralty law, the marina was able to arrest Lozman's houseboat to protect its interest in being paid.

Lozman disputed that his houseboat was a "vessel." It was indefinitely moored, had no motor or other means of self-propulsion, could not be steered and was not intended to transport people over water. The Eleventh Circuit upheld the district court's finding that Lozman's floating residence was a "vessel" because it was "capable" of movement over water, regardless of whether Lozman had ever used it such manner or intended to in the future. Lozman appealed, and the Supreme Court granted certiorari in February 2012.

Held: On January 15, the Supreme Court reversed, holding that the Eleventh Circuit had adopted an unacceptably generous interpretation of the concept "capable."

Discussion: In a 7-2 opinion penned by Justice Breyer, the Court held that not every floating contraption technically able to be moved through the water should be considered "capable of … being used as a means of transportation on water" for purposes of admiralty jurisdiction. The opinion pointed to "a wooden washtub, a plastic dishpan, a swimming platform on pontoons" as items that would fulfill a rigid definition of "capable."

The Court moved away from the strict construction employed by the Eleventh Circuit, introducing a "reasonable observer" test. Justice Breyer stated that Lozman's houseboat "does not fall within the statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."

The fact that Lozman's residence was an ungainly rectangular box that barely floated above the waterline, had no power or steering and was clearly not intended to transport people over water

would require the reasonable observer to conclude that it was not a vessel. Other cases involving flat-bottomed craft such as dredging barges were distinguishable; they did in fact carry a crew and were in fact routinely towed from place to place.

The Court pointed out that its result did not undermine the purposes of federal maritime jurisdiction—to provide special attachment provisions lest a vessel avoid liability by sailing away. It was also consistent with laws in states with large houseboat communities such as Washington and California.

Justice Breyer disagreed strongly with the City's argument that his approach was subjective, stating unequivocally that "the Court has considered only objective evidence." While the reasonable observer test was not perfectly precise, "it is workable and consistent and should offer guidance in a large number of borderline cases." Finally, the majority declared that nothing would be gained by remand.

Dissent: Justice Sotomayor dissented, joined by Justice Kennedy. She agreed that the Eleventh Circuit's test for what was "capable" of overwater transport was too broad. However, the majority's introduction of the "reasonable observer" standard was inherently subjective and would lead to more debate. The dissent pointed out that a wide swathe of erstwhile "vessels" which would be excluded under Justice Breyer's test were already excluded under existing standards and precedents: those which were permanently moored; those which while previously seaworthy had been modified or "mothballed" to the point of inutility; and those "whose physical characteristics and usage history reveal no maritime transport purpose."

Justice Sotomayor was unpersuaded by the majority's conclusion that Lozman's houseboat was not a vessel. It had in fact been towed hundreds of miles on two occasions. And it had much in common with watercraft that had been found to be "vessels" in a long line of precedent. At a minimum, she said, the case should have been remanded for further examination of the houseboat's specifics.

http://www.supremecourt.gov/opinions/12pdf/11-626_p8k0.pdf

Arkansas Fish and Game Commission v. U.S. **–**Temporary Takings

This case was argued on October 3, 2012. IMLA filed as an amicus supporting the federal government. The issue in the case involves the question of whether a taking occurs when the federal government releases water from a dam that floods property downstream. In this case, the Commission argues that the flooding was repeated as it occurred over a period of six years and resulted in the loss of timber valued in the hundreds of thousands of dollars. The federal government takes the position that being a downstream riparian owner requires the property owner to accept certain burdens with the benefits of riverside ownership, including getting flooded from time to time. The Federal Circuit, which ruled for the United States, did not go

quite so far, but concluded that a property owner could not recover under the Takings Clause for a temporary invasion of property.

On December 4, 2012, the Supreme Court unanimously decided that the facts in *Arkansas Fish and Game Commission v U.S.* support a claim for "temporary taking" which will no doubt lead to a host of lawsuits alleging that the federal, state and local governments have "taken" property from owners who deserve compensation under the Fifth Amendment. We often hear that "bad facts make bad law" and this may be one of those cases. But to understand why this case is important and how its facts may have shaped its outcome, we first need to look at the law as it stood before this decision.

In 1924, the Supreme Court decided a case, *Sanguinetti v United States*, 264 U.S. 146 (U.S. 1924). That case asked the question whether acts of the government leading to the temporary but non-permanent flooding of a person's property could amount to a "taking." In Sanguinetti, the Court said "No." More specifically it said:

"Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

264 US at 149. About seven years before *Sanguinetti*, the court had decided that seasonally permanent recurring flooding resulting from the government's construction of a dam and lock was sufficiently permanent to require compensation. *United States v Cress*, 243 U.S. 316(1917). Then in 1947, the court decided a case where the government built a dam that ultimately flooded several properties both permanently and, as in *Cress*, intermittently but on a permanent basis. There the court stated a very precise rule for determining when the government has taken property:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

United States v Dickinson, 331 U.S. 745, 748 (U.S. 1947)

With this jurisprudential history, in mind, consider the facts leading to the dispute between the United States and the Arkansas Fish and Game Commission as described by Justice Ginsburg:

> "The Commission owns the Dave Donaldson Black River Wildlife Management Area (Management Area or Area), which comprises 23,000 acres along both banks of the Black River in northeast Arkansas. The Management Area is forested with multiple hardwood timber species that support a variety of wildlife habitats. The Commission operates the Management Area as a wildlife and hunting preserve, and also uses it as a timber resource, conducting regular harvests of timber as part of its forest management efforts. Three types of hardwood oak species—nuttall, overcup, and willow—account for

80 percent of the trees in the Management Area. The presence of these hardwood oaks is essential to the Area's character as a habitat for migratory birds and as a venue for recreation and hunting.

"The Clearwater Dam (Dam) is located 115 miles upstream from the Management Area. The Corps constructed the Dam in 1948, and shortly thereafter adopted a plan known as the Water Control Manual (Manual) to determine the rates at which water would be released from the Dam. The Manual sets seasonally varying release rates, but permits planned deviations from the prescribed rates for agricultural, recreational, and other purposes.

"In 1993, the Corps approved a planned deviation in response to requests from farmers. From September to December 1993, the Corps released water from the Dam at a slower rate than usual, providing downstream farmers with a longer harvest time. As a result, more water than usual accumulated in Clearwater Lake behind the Dam. To reduce the accumulation, the Corps extended the period in which a high amount of water would be released. The Commission maintained this extension yielded downstream flooding in the Management Area, above historical norms, during the tree-growing season, which runs from April to October. If the Corps had released the water more rapidly in the fall of 1993, in accordance with the Manual and with past practice, there would have been short-term waves of flooding which would have receded quickly. The lower rate of release in the fall, however, extended the period of flooding well into the following spring and summer. While the deviation benefited farmers, it interfered with the Management Area's tree growing season.

"The Corps adopted similar deviations each year from 1994 through 2000. The record indicates that the decision to deviate from the Manual was made independently in each year and that the amount of deviation varied over the span of years. Nevertheless, the result was an unbroken string of annual deviations from the Manual. Each deviation lowered the rate at which water was released during the fall, which necessitated extension of the release period into the following spring and summer. During this span of years the Corps proposed Manual revisions that would have made its temporary deviations part of the permanent water-release plan. On multiple occasions between 1993 and 2000, the Commission objected to the temporary deviations and opposed any permanent revision to the Manual, on the ground that the departures from the traditional water-release plan adversely impacted the Management Area. Ultimately, the Corps tested the effect of the deviations on the Management Area. It thereupon abandoned the proposal to permanently revise the Manual and, in 2001, ended these temporary deviations."

The Commission sued the government believing the damage to its property and the loss of value to its hardwood constituted a taking. Based on *Sanguinetti*, *Cress*, and *Dickinson*, the government resisted. Indeed, with those cases in mind, the most the Commission might claim is that the government trespassed against its property or created a nuisance, but by agreeing to stop the deviations (or excess Springtime water releases) it no longer needed an easement to produce

those intermittent floods. A unanimous (8-0 Justice Kagan recused) court sided with the Commission and Justice Ginsberg rewrote legal history.

Obviously, the Court needed to address the language in *Sanguinetti* requiring a permanent invasion of land for there to be a taking. Referring to the quote for *Sanguinetti*, Justice Ginsburg deftly pushed it aside saying:

> "We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v Virginia*, 6 Wheat. 264, 399 (1821)."

Perhaps, the Court's most troubling reference to authority for its temporary takings analysis flows from Justice Ginsburg's recitation of cases decided during and after World War II to support the theory that the court had adopted the rule that temporary takings were compensable, saying:

> "Furthermore, our decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when"[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime." *United States v Westinghouse Elec. & Mfg. Co*., 339 US 261, 267(1950). In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings."

It is true that several cases stemming from World War II recognize that when the government seizes property temporarily that the owners are entitled to compensation under the Fifth Amendment. In *Westinghouse*, the government condemned Westinghouse' leasehold interest and exercised a right to extend its use beyond the term of Westinghouse's lease, thereby triggering additional bases for compensation. Unlike the question in *Arkansas Fish and Game Commission*, the issue in these cases was not whether the government's actions amounted to a tort (either trespass or nuisance) or a taking, but rather, how much and to what extent and for what the government must compensate a person for the taking. These cases are a thin reed upon which to hang the heavy weight of this decision. And, despite citing *Dickinson* in this litany of cases, Justice Ginsburg ignores its very bright line rule for determining a taking in circumstances such as these – whether as between private parties a servitude has been created and does not mention or analyze what had been an important distinction between tort and taking – whether as between private parties would it have been a tort or a servitude? One can only infer that the Justices were moved by what were sympathetic facts.

What happens now? The court did not conclude that all temporary invasions of a person's property amount to a "taking." Instead, the court explained that a number of factors must be considered in reaching that conclusion. These include:

* The "particular circumstances of each case,"

* Time (duration) in determining the existence *vel non* of a compensable taking,

* The degree to which the invasion is intended or is the foreseeable result of authorized government action; and

* The character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use.

In terms of future flooding cases, the court also noted that it was not considering the effect of Arkansas law on whether a taking had occurred because the parties did not argue it, nor did the court consider a last minute government argument that flooding downstream properties as distinct from upstream properties amounts to an indirect and consequential damage for which compensation is not due. Regardless, of the effect of these issues on the law, the case will no doubt spew forth a host of new lawsuits against governments for acts that previously would have been considered torts, but not takings.

IMLA participated as an amicus in *Arkansas Fish and Game Commission v U.S.* This was an unusual case for IMLA as it took the side of the federal government perceiving that a rule allowing temporary takings for flooding would have an adverse effect on local governments. Only time will tell.
IMLA's brief was authored by John Echeverria.

Florida v. Harris – Fourth Amendment, K-9 alert as an element of or equal to probable cause

The Court has agreed to hear the appeal in *Harris v. State*, 71 So. 3d 756 (Fla. 2011), *cert. granted*, (U.S. Mar. 26, 2012) (No. 11-817), from a ruling of the Florida Supreme Court. The question in the case is whether a drug-detection dog's alert to the exterior of a vehicle provides an officer with probable cause to conduct a warrantless search of the interior of the vehicle. The Florida Supreme Court held that evidence that the dog had been trained and certified to detect narcotics, standing alone, was not sufficient to establish the dog's reliability for purposes of determining probable cause, especially since training and certification in the state were not standardized and thus, each training and certification program could differ with no meaningful way to assess them. To meet its burden of establishing that the officer had a reasonable basis for believing the dog to be reliable in order to establish probable cause, "the State must present the training and certification records, an explanation of the meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle."

The drug-sniffing dog in this case – Aldo – had performed a "free air sniff of the exterior" of a truck after it had been stopped for having an expired tag. The driver, Harris, refused to consent to a search, and Aldo then alerted to the presence of drugs on the door handle of the driver's side. Underneath the driver's seat, police found over 200 pseudoephedrine pills (used to make meth). However, Aldo was not trained to detect pseudoephedrine. Although his handler testified that pseudoephedrine was a precursor of meth, there was no testimony on whether a dog trained to detect and alert to meth would also detect and alert to pseudoephedrine. The handler also testified that he did not keep records of Aldo's alerts in the field when no contraband was found; he documented only Aldo's successes.

Significantly, about two months after the stop in which the pills were found, the same police officer stopped Harris again for a traffic infraction. On this stop, Aldo was again deployed and alerted to the same driver's side door handle. A subsequent search of the truck revealed only an open bottle of liquor and no illegal substances. The Florida Supreme Court ruled that when a dog alerted, the fact that the dog had been trained and certified was "simply not enough to establish probable cause to search the interior of the vehicle and the person."

On February 13, the Supreme Court decided this case. Justice Kagan wrote for a unanimous court to reverse the Florida Supreme Court. In the opinion, Justice Kagan reviewed the Court's "probable cause" jurisprudence and concluded that it had never set rigid rules for determining what is a common sense based standard of whether there is a "fair probability" on which reasonable people, not legal technicians act to conclude that a crime has been committed and evidence of that crime exists. "The Florida Supreme Court flouted this established approach to determining probable cause."

Bottom line, a probable cause hearing based on a dog's alert should proceed like any other – the state must prove that a basis exists for a reasonable person to believe that a fair probability exists and the defendant must have an opportunity to show that the information is unreliable or insufficient.

Florida v. Jardines

This case involves a significant Fourth Amendment question of whether a dog sniff outside a person's front door invades the sanctity of the home or falls within a permissible search of an area open to the public. Based on a "crime stoppers" tip that the Jardines were growing marijuana at their house, two detectives brought a drug detection dog up to the front door of the Jardines' house to, in their words, initiate a discussion with the resident about a consent search. While approaching the front door, the dog alerted to the scent of contraband. The detectives then got a search warrant, searched the home, and confirmed marijuana was being grown there.

The Florida Supreme Court while recognizing the legitimacy of the "knock to talk" authority of an officer to enter property to speak with the resident, held that the dog sniff in this case "is a

substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment," and must be based on probable cause.

State and local police officers routinely engage in "knock and talk" interactions with residents of property and also routinely use drug dogs to detect drugs. Being able to combine these methods of interaction to use them to sniff outside private residences—without probable cause—is advantageous to law enforcement. The U.S. Supreme Court has yet to hold that a dog sniff is a Fourth Amendment search in any of the contexts it has decided (luggage, drug interdiction checkpoint, vehicle exterior during a traffic stop). However, like the Florida Supreme Court, it may view sniffing outside a private home as more intrusive and therefore protected by the Fourth Amendment.

LA County Flood Control District v. National Resources Defense Council (No. 11-460)
Plaintiffs are two environmental groups, National Resources Defense Council and Santa Monica Baykeeper. These groups sued Los Angeles County and the Los Angeles County Flood Control District, alleging that the County and District are discharging polluted stormwater in violation of the Clean Water Act. On June 25, the Supreme Court granted cert on one of the Questions Presented.

The District overlooks 500 miles of open channels and 2800 miles of storm drains. Stormwater runoff is channeled into these drains and ultimately ends up in one of four rivers: Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek. Under NPDES permit requirements, the District monitors the pollution levels at monitoring stations at separate facilities for each river/creek. For two of the rivers, the water is channeled from the navigable waters of the river into a side/separate man-made channel, and then sent back out into the navigable water after monitoring. For the other two rivers, the monitoring occurs using the existing stream and is not channelized.

Both parties agree that numerous water-quality standards have been exceed in all four rivers (collectively, the "Watershed Rivers"), but the County and District contend that there is no evidence establishing their responsibility, or discharge of, pollutants to the Watershed Rivers. The district court agreed with the County/District, noting that the Plaintiffs failed to present evidence showing that the County/District were responsible for the stormwater pollution discharge. The Ninth Circuit reversed in part, saying that the District was responsible with regards to the two rivers that had a separate channel for monitoring the water. In the two rivers where the Ninth Circuit found in favor of the Plaintiffs, the Ninth Circuit stated that the District controlled the "discharge" because the water left the navigable waters, went into the monitoring stations and went back out ("point source") into the navigable waters. The Clean Water Act prohibits the "discharge" of any pollutant into navigable waters. It did not matter to the Ninth Circuit whether or not the pollution existed at the point of entry into the channel; all that mattered was that the District "discharged" pollutants back into the water. Since the pollution existed at the point of the monitoring stations, there was evidence that pollution in excess of allowable limits existed at the point source (exit from the monitoring station). For the other two

rivers, the court ruled that there was not sufficient evidence to show District liability (no *channeled* monitoring stations before "end of the pipe").

The Supreme Court granted cert limited to the question of "what is a discharge?"

When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, whether there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in South Florida Water Management District v. Miccosukee Tribe of Indians, that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

IMLA filed an Amicus Brief in this case supporting the County and the District authored by the Emory Law School Supreme Court Advocacy Clinic.

The Supreme Court reversed the Ninth Circuit, holding that flow from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not constitute the "discharge of a pollutant" within the meaning of the Clean Water Act (CWA).

The Ninth Circuit's decision was at odds with the Supreme Court's decision in *Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U. S. 95 (2004), which had held that pumping polluted water from one part of a water body into another part of the same water body was not a discharge of pollutants under the CWA.

In a succinct unanimous opinion authored by Justice Ginsburg, the Court found that the material facts in *Los Angeles* were analogous to those in *Miccosukee*. If no discharge occurred in *Miccosukee* when polluted water was removed from one water body and transferred to another, then the mere flow of water from an improved portion of a waterway to an unimproved portion of the same waterway did not constitute a discharge of pollutants under the CWA. Furthermore, the Ninth Circuit's result did not square with the definitions in the CWA itself, which defines "discharge of pollutant" to mean "any *addition* of any pollutant."

http://www.supremecourt.gov/opinions/12pdf/11-460_3ea4.pdf

City of Arlington v. FCC - *Chevron Deference, FCC "Shot Clock" Rule*

Section 332(c)(7) of the Telecommunications Act of 1996 broadly preserves local zoning authority over siting applications concerning wireless service facilities, subject to a narrow set of statutory requirements. *See* 47 U.S.C. § 332(c)(7) (entitled "Preservation of local zoning authority"). Subsection (A) of the Act states: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal

wireless service facilities." § 332(c)(7)(A). Subsection (B) provides a narrow set of exceptions to subsection (A)'s general rule. Under these "[l]imitations," state and local governments must "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed …, taking into account the nature and scope of such request." § 332(c)(7)(B)(ii).

In addition, state and local zoning authorities may not "unreasonably discriminate among providers of functionally equivalent services" or "prohibit or have the effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i). And the Act mandates that the denial of any such request must be "in writing and supported by substantial evidence contained in a written record." § 332(c)(7)(B)(iii). The Act is not silent as to which government body is to "hear and decide" disputes under these provisions. It specifically provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government … that is inconsistent with [47 U.S.C. § 332(c)(7)(B)] may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." § 332(c)(7)(B)(v). The Act provides no similar grant of authority to the FCC. The FCC does, however, possess statutory jurisdiction over a single, narrow issue: the environmental effects of radio frequency emissions. The Act denies state and local authorities the power to "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." § 332(c)(7)(B)(iv). Any person aggrieved under this provision "may petition the Commission for relief." § 332(c)(7)(B)(v).

The Act's legislative evolution also reflects this careful balance of local and national interests. The first iteration of section 332(c)(7) adopted by the House of Representatives would have granted the FCC broad jurisdiction to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Among other things, the House version would have given the FCC power to "ensure that … a State or local government … shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.* But Congress did not adopt this broad grant of regulatory power. The conference committee "rejected the national approach" proposed in the House bill and "substituted a system based on cooperative federalism." *Rancho Palos*, 544 U.S. at 128 (Breyer, J., concurring).1 Thus, rather than granting the FCC jurisdiction to "prescribe and make effective a policy regarding State and local regulation of … facilities for the provision of commercial mobile services," H.R. Rep. No. 104-204, at 25, the final Act expressly preserves state and local authority over zoning matters, *see* 47 U.S.C. § 332(c)(7)(A). The conference report explained that, aside from the single, narrow issue of radio frequency emissions, which was delegated to the FCC, "the courts shall have exclusive jurisdiction over all other disputes arising under" section 332(c)(7). Further, the report instructed that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile

radio service] facilities should be terminated." H.R. Conf. Rep. No. 104-458 at 208, 1996 U.S.C.C.A.N. 10 (1995).

For over a decade, the FCC asserted no regulatory jurisdiction under section 332(c)(7), other than to regulate radio frequency emissions. Disputes about timing and related matters were decided by the courts, "taking into account the nature and scope of [each] request." 47 U.S.C. § 332(c)(7)(B)(ii). As Judge Boudin aptly summarized the landscape: "Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law." *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

Eventually, though, telecommunications carriers sought relief, and not from Congress. Instead, in 2008, Respondents CTIA–The Wireless Association filed a petition with the FCC requesting, among other things, "that the Commission issue a Declaratory Ruling" setting "timeframes in which zoning authorities must act on siting requests for wireless towers and antenna sites." Pet.App.71a.

CTIA specifically asked the FCC to mandate a 45-day time limit for applications "proposing to collocate on an existing facility"2 and a 75-day limit for "noncollocation wireless siting application[s]." *Id.* at 77a. CTIA further proposed that, when a local zoning authority does not act within these deadlines, the siting request should be "deemed granted" or, alternatively, the application should be presumptively entitled to "a court-ordered injunction granting the application unless the zoning authority can justify the delay." *Id.* CTIA also asked the FCC to rule that the Act prohibits local authorities from denying a siting application "based on one or more carriers already serving the geographic area." *Id.* At 78a.

The FCC determined that it has jurisdiction to issue the requested rules under the Act. It began with the observation that "Congress delegated to the Commission the responsibility for administering the Communications Act." *Id.* at 87a. Upon reaching the merits, the FCC granted the petition in part. The Commission granted the industry's request for time limits on local zoning authorities' processing of siting applications, but it considered the proposed time limits "insufficiently flexible for general applicability." *Id.* at 114a. Instead, the FCC set a 90-day time limit for collocation applications and a 150-day time limit for non-collocation applications. *Id.* at 115a. The time limits do not begin running until an application is complete, and if an application is incomplete, zoning authorities must notify the applicant within 30 business days after submission. *Id.* at 124a. The FCC did not adopt CTIA's suggestion that an application should be "deemed granted" when a zoning authority fails to act within the FCC time limits. Rather, the Commission provided that "State or local authorit[ies] will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* at 112a. Yet, the Commission was clear that its time limits trump any contrary state or local deadlines, thus allowing suits even where state or local law would grant a zoning authority more than 90 or 150 days to reach a decision. *Id.* at 121a.

The Fifth Circuit upheld the FCC's jurisdictional determination. Critically, the court reached that conclusion by applying circuit precedent holding that agencies are entitled to *Chevron* deference even when deciding questions of their "own statutory jurisdiction." Pet.App.37a. Without separately addressing whether "Congress delegated authority to the agency generally to make rules carrying the force of law" regarding local zoning applications, *Mead*, 533 U.S. at 226–27, the court proceeded directly to the question of whether section 332(c)(7) is ambiguous as to the FCC's jurisdiction, *see Chevron*, 476 U.S. at 843. Pet.App.40a. The court noted the FCC's general rulemaking authority under the Communications Act, *id.* at 39a–40a, then concluded that section 332(c)(7) is silent on whether the FCC may exercise its general authority to "implement" the specific limitations set forth in section 332(c)(7)(B), *id.* at 41a, 45a. In the court's view, "Congress did not clearly remove the FCC's ability to implement the limitations set forth in section 332(c)(7)(B)" and thus the Act leaves the scope of the Commission's authority ambiguous—despite the Act's grant of exclusive jurisdiction to the courts. *Id.* at 42a–43a (holding that section 332(c)(7)(b)(v) "does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act").

The Court granted certiorari to consider a question that squarely implicates the horizontal separation of powers at the federal level. But this case also involves the other fundamental structural protection in our Constitution: the vertical separation of powers between the federal government and state and local governments. Both of the Constitution's basic structural protections underscore that the FCC is not entitled to deference in asserting its own jurisdiction at the expense of state and local governments.

IMLA was accorded intervenor status in the Fifth Circuit and therefor has party status in the Supreme Court. IMLA was fortunate to have Paul Clement represent it in this matter. Paul is the leading Supreme Court advocate of the day and has filed what we believe to be an effective brief in support of overturning the Fifth Circuit's decision and the FCC's actions.

Dan's City Used Cars, Inc. v. Pelkey – FAAA, Preemption, Towing Companies

Mr. Pelkey lived in an apartment building with rules that required owners of vehicles parked on the property to move the vehicles during or shortly after snow events to allow the parking lot to be plowed. During one snow event, Mr. Pelkey was unable to move his car because illness confined him to bed. Indeed, shortly after the snow event Pelkey had his foot amputated at the hospital. On returning home, Pelkey attempted to find his car. It had been towed for violation of the landlord's policy. Pelkey located the towing company and his attorney learned that an auction of the car was to occur in two days for non-payment of the towing fees. The attorney sought to arrange for the return of the car. Apparently, the towing company sold the vehicle at auction but there were no bidders, so the towing company took title. When contacted by Pelkey's attorney, the towing company denied it had possession of the car and shortly thereafter transferred the car to a third party. Pelkey sued under various statutory and common law remedies. The lower court concluded that the Federal Aviation Administration Act §14501(c)(1)

preempted the state's consumer protection laws, the state's towing lien law and the common law of bailment insofar as each protected Pelkey's interests.

The New Hampshire Supreme Court reversed, siding with Pelkey, primarily by concluding that the New Hampshire laws did not apply to this situation "with respect to transportation of property" a key element of the preemption. In addition, the court concluded that the laws being preempted did not relate to the towing company's "service", but instead applied to its business operations outside of its services. The court found support for its opinion in the dearth of available remedies to Pelkey if these state laws were preempted as the court concluded that federal law did not offer any remedy, thus preemption would have left Pelkey without any remedy for a factual scenario the court determined Congress could not have intended to support.

A.T.A. v. Los Angeles – FAAA, Preemption, Right of Governmental Property Owner

In another case involving the preemptive affect of the FAAA, the American Trucking Association filed suit against the City and Port of Los Angeles over a policy that restricted drayage trucks using the Port. The Port owns land given to it by the State of California and operates one of the largest ports in the United States. For years the port wanted to expand but faced opposition from environmental groups and from neighboring property owners. To resolve some of the environmental concerns and in response to a consent decree, the Port developed a policy that required any drayage vehicle using the Port to enter into a concession agreement with the Port. Drayage vehicles are not hired by the Port, instead shipping companies and transportation companies hire the drayage vehicles to ply their trade at the port, thus these independent contactors needed concession agreements from the Port to operate under the terms of their contracts with the shipping and transportation companies. The concession agreements set forth fourteen specific requirements covering, among other things, truck driver employment, truck maintenance, parking, and Port security. The agreements were adopted as part of the Port's "Clean Truck Program" (CTP), which includes a progressive ban on older (and higher-polluting) trucks on Port property, a multifaceted incentive program to support acquisition of clean trucks, and a system of penalties on transport of cargo by older trucks. The Port adopted the CTP in response to community opposition, including litigation, that had successfully stymied Port growth from the mid-1990s through 2007.

Recognizing that trucks are a major source of air pollution at the Port, the Clean Truck Program, which was "designed to reduce emissions from the heavy duty trucks involved in port drayage to improve the health of people living in the communities surrounding the [Port]." From November 2006 through February 2008, the Ports worked to develop the Clean Truck program. The Ports held a number of public meetings, consulted with stakeholders, and hired consultants to evaluate ideas for implementation.

To address concerns that the program might require elimination of more than 16,000 older trucks and affect the livelihood of thousands of drayage operators, the Port decided to implement concession agreements as part of the Clean Truck Program. In March 2008, the Port approved a

multi-faceted incentive program and a concession agreement system. The incentive programs are not directly at issue in this appeal.

On October 1, 2008, the Port issued an order that effectively banned drayage vehicles from the port by prohibiting Terminal operators from allowing a drayage vehicle from using its facilities if their operators did not have a concession agreement. The concession plans created a direct contractual agreement between the Port and motor carriers providing drayage services.

Five provisions of the concession agreements are at issue in this appeal:

1. Provision III(d) requires concessionaires to transition over five years to using 100% employee drivers rather than using independent owner-operators. (The employee-driver provision).

2. Provision III(f) requires concessionaires to submit for approval "an off-street parking plan that includes off-street parking locations for all Permitted Trucks" and requires concessionaires to ensure that Permitted Trucks are "in compliance with parking restrictions by local municipalities." (The off-street parking provision).

3. Provision III(g) makes concessionaires "responsible for vehicle condition and safety" and requires them to "ensure that the maintenance of all Permitted Trucks . . . is conducted in accordance with manufacturer's instructions." (The maintenance provision).

4. Provision III(1) requires concessionaires to "post placards on all Permitted Trucks" when the trucks are "entering and leaving Port Property and while on Port Property." The placards shall "refer[] members of the public to a phone number to report concerns regarding truck emissions, safety, and compliance to the Concession Administrator and/or authorities." (The placard provision).

5. Provision III(n) requires a concessionaire to "demonstrate [] to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under th[e] Concession [agreement]." (The financial capability provision).

Each concessionaire also agreed to pay a one-time concession fee of $2,500, and an annual fee of $100 for each permitted truck. As of April 2010, approximately 600 motor carriers had signed concession agreements with the Port.

The Ninth Circuit concluded that the Port’s concession agreements were not preempted by the FAAA because they did not directly affect rates, routes or services and because as owner of the Port the City and its Port Authority were market participants. The Supreme Court granted cert to consider the following issues:

> Whether 49 U.S.C. § 14501(c)(1), which provides that “a State [or] political subdivision . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to

> the transportation of property," contains an unexpressed "market participant" exception and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services; and (2) whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines Inc.*

IMLA has agreed to participate as an amicus in this case to support the city in conjunction with the State and Local Legal Center Michael Burger of the Roger Williams School of Law is authoring IMLA's brief.

McBurney v. Young – Privileges and Immunities

McBurney and Hurlbert filed suit seeking to have a Virginia FOIA style law invalidated because the law limited the right of access to public records to "citizens" of the state. The district court awarded summary judgment to the Deputy Commissioner and Director of the Division of Child Support Enforcement for the Commonwealth of Virginia and the Director of the Real Estate Assessment Division of Henrico County, Virginia. The district court held that Virginia's Freedom of Information Act, Va. Code Ann. § 2.2-3700 et seq. (2011), ("VFOIA") did not violate the Plaintiffs' rights under the Privileges and Immunities Clause (U.S. Const. art. IV, § 2, cl. 1) or Hurlbert's rights under the dormant commerce clause of the United States Constitution.

In enacting the VFOIA, the Virginia General Assembly stated its purpose to:

> ensure[] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

Va. Code Ann. § 2.2-3700(B), para. 1. The statute provides, in relevant part:

> Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with

> circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth… .

Va. Code Ann. § 2.2-3704(A).

The Fourth Circuit affirmed. Concluding that the VFOIA does not infringe on any of the Appellants' fundamental rights or privileges protected by the Privileges and Immunities Clause. The court also concluded that the act had only an incidental affect on commerce and did not run afoul of the Commerce Clause.

IMLA took the lead and with other national organizations participated as an amicus in this case.

Maryland v. King – Privacy Rights, Due Process, Self Incrimination, Search and Seizure

This is a facial and as-applied constitutional challenge to that portion of the Maryland DNA Collection Act (the "Act") that purports to authorize State and local law enforcement authorities to collect DNA samples from individuals who are arrested for a crime of violence, an attempted crime of violence, a burglary, or an attempted burglary. Maryland Code (2003, 2011 Repl.Vol.), Pub. Safety Art., § 2-504(3). King, was arrested in 2009 on first- and second-degree assault charges. Pursuant to § 2-504(3) of the Act, King's DNA was collected, analyzed, and entered into Maryland's DNA database. King was convicted ultimately on the second-degree assault charge but, pending his trial on that charge, his DNA profile generated a match to a DNA sample collected from a sexual assault forensic examination conducted on the victim of an unsolved 2003 rape. This "hit" provided the sole probable cause for a subsequent grand jury indictment of King for the rape. A later-obtained search warrant ordered collection from King of an additional reference DNA sample, which, after processing and analysis, matched also the DNA profile from the 2003 rape. King was convicted of first-degree rape and sentenced to life in prison.

The Maryland Court had previously concluded that Act constitutional when applied to convicted persons, but in this case determined that the Act authorizing collection of a DNA sample from a mere arrestee is unconstitutional as applied to King but while likely unconstitutional when applied to arrestees generally, there exists the possibility that there may be a basis to support obtaining a DNA sample to identify an arrestee accurately, so did not accept the facial challenge to the Act. Instead, it crippled it.

The Supreme Court granted certiorari. IMLA, with others, has filed a brief in support of the State of Maryland.

***Shelby County v. Holder*, 679 F.3d 848 (D.C.Cir. 2012) *cert. granted* (U.S. Nov. 9, 2012) (No. 12-96)**

In 2006 Congress reauthorized the Voting Rights Act of 1965 (VRA) for 25 years. Section 5 of the VRA requires that “covered” jurisdictions obtain federal preclearance before any altering election laws. Petitioner Shelby County, Alabama, joined by many other jurisdictions, argues

that Congress no longer has the power to extend Section 5 of the VRA under the Tenth Amendment and Article IV of the Constitution.

BACKGROUND: Between 1865 and 1870, a federal Congress sitting in Washington D.C. passed sweeping legislation to right wrongs which had been part of American life for more than two centuries. The Thirteenth Amendment abolished slavery in 1865: "Neither slavery nor involuntary servitude…shall exist within the United States." The Fourteenth Amendment passed three years later and prohibited states from abridging the "privileges or immunities of citizens of the United States," or depriving any person of "life, liberty or property without due process of law," or "the equal protection of the laws." It also gave Congress the "power to enforce" its provisions by "appropriate legislation."

The Fifteenth Amendment, passed in 1870, protected the right of newly-enfranchised citizens to vote: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Although slavery may have ended with Appomatox, the promises of the Fourteenth and Fifteenth Amendments took much longer to materialize. Race discrimination continued to shackle Southern voting rights until long after World War Two, in the color of literacy tests, poll taxes, property requirements, gerrymandering, annexation and de-annexation, bond requirements for candidates and outright intimidation. Congress sought to remedy this evil with a number of acts beginning in 1950, but many states still evaded the laws. Each time that a particular discriminatory practice was identified and stamped out by federal action, jurisdictions would modify their voting criteria, continuing a cat and mouse game of disenfranchisement.

THE VOTING RIGHTS ACT: Congress took extreme action in 1965, passing the Voting Rights Act (VRA). Unlike prior legislation, the VRA combined a permanent case-by-case enforcement mechanism with more stringent temporary remedies targeting specific areas of the country where discrimination still flourished. Section 2 of the VRA restated the essence of the Fifteenth Amendment, prohibiting "any standard, practice or procedure" which resulted in "the denial or abridgement of any citizen of the United States to vote on account of race of color."

Section 5 provided a more nimble remedy. It required that States which had maintained a voting "test or device" in 1964 and had less than 50% turnout or registration for the 1964 Presidential election would henceforth be required to obtain federal "preclearance" for *all* voting changes. In order to obtain approval for a voting change, the jurisdiction had to demonstrate that the change was not discriminatory in purpose or effect. Not surprisingly, the States covered in their entirety were Texas, Alabama, South Carolina, Mississippi, Virginia and Louisiana. Many other political subdivisions—counties, cities and towns in 7 additional states—were covered individually.

The VRA was renewed in 1970, 1975 and in 1982 for 25 years. In 2006, supported by 15,000 pages of testimony and an extensive review of voting conditions around the nation, it was extended for another 25 years in a bill passed overwhelmingly in the House and by a 98-0 vote in the Senate. It was signed into law by President Bush.

CHALLENGES: This extension is now at the heart of legal challenges. Over the decades, allegations of race discrimination at the ballot box have greatly subsided. Federal voting investigations are becoming infrequent. In many "covered" jurisdictions, participation by minority voters now approximates levels of the population at large. Section 5 and its preclearance policies have begun to be challenged as an unnecessary and unwarranted intrusion into state sovereignty.

In *Northwest Austin Municipal Utility District No. One v. Holder* 557 U.S 193 (2009), (*Namundo*) a Texas municipal water district wished to elect new board members and wanted to change the polling place from a private home to a public school. Because Texas was covered by the VRA, the water district was required to seek federal preclearance authority to make such a move. It brought suit, which made its way to the Supreme Court. The Court expressed concern that Section 5 might have outlived its purpose but avoided a declaration that preclearance was unconstitutional. Instead, *Namundo* simply redefined the terms by which a political subdivision covered by Section 5 can request exemption from federal review—the so-called "bailout" process. The petitioner in *Namundo* was shown a clear path to bailing out of Section 5, essentially mooting its larger constitutional challenge. Justice Roberts wrote for the 8-1 majority, with Justice Thomas in dissent declaring outright that Section 5 was unconstitutional.

Bailouts increased after *Namundo*. To obtain a bailout, jurisdictions must demonstrate a lack of voting discrimination suits during the prior ten years and pay filing costs and associated legal fees, estimated to be between $2,500 and $5,000.

Against this backdrop, Shelby County Alabama brought suit challenging the 2006 extension of Section 5 of the VRA. The County was unsuccessful at the U.S. District Court for the District of Columbia, and it appealed. In *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), the D.C. Circuit again rebuffed the County, in a 100-page decision which noted that the VRA and Section 5 was still required, given significant continued voting abuses, including new voter ID laws and changes to early voting parameters. The County petitioned for certiorari, which was granted late last year. *Shelby County v. Holder*, No. 12-96 (cert. granted Nov. 9, 2012).

QUESTION PRESENTED: The question presented is: "Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution."

The County argues that coverage formulas based on 1964 voting patterns can no longer be defended as reasonably tailored and in fact irrationally discriminate against numerous jurisdictions nearly 50 years later. It asserts that the generalized provisions of Section 2 of the VRA are now sufficient to police continued adherence to the Fifteenth Amendment.

The Attorney General points out that the 2006 extension was based on extensive testimony pointing to a continued need for special vigilance against voting abuses; the fact that fewer

discrimination cases are now being brought against covered jurisdictions provides evidence that the VRA's Section 5 is functioning, not that it is an unconstitutional anachronism.

The Court heard oral argument on February 27, 2013; it was a spirited debate. Some 50 amicus briefs were filed.

Horne v. U.S. Dept. of Agriculture – Takings

This case provides facts unusual for local governments, but the issue is strikingly important. Under federal law, production of grapes and raisins are regulated under a cooperative program designed to provide price support for the industry and prevent wide variances of price from year to year. As part of the program, handlers, but not producers of grapes must divide their grapes into two market cohorts "free tonnage" and "reserve tonnage". The free load grapes are sold at market price and the handlers paid accordingly. The reserve load grapes are held back and used for programs such as the free lunch program and other non-market uses, unless sufficient demand and product exist in the market to perpetuate a fairly consistent market price. If the reserve load grapes are sold, the handlers are paid their share after the costs of the program are paid.

The Plaintiffs in this case are producers who have produced grapes for raisins for at least two generations. As the 21st Century began, they entered the field of handling grapes; i.e., processing them into raisins and were advised that as handlers they were subject to the regulations affecting market and price. Rather, than complying the Plaintiffs ignored the regulations, the regular admonitions of the USDA and ultimately sought to avoid paying penalties and charges for those violations through the administrative process by asserting in part that the regulatory scheme constituted a "taking" in violation of their Fifth Amendment rights.

At the Ninth Circuit, the court discussed the Fifth Amendment claim and concluded that the Plaintiffs were not entitled to compensation. Following a request for rehearing, the Ninth Circuit amended its decision and for the first time sided with the government's position that the Plaintiffs could not raise the "takings" claim to defend their actions, but had to file suit under the Tucker Act for damages if they felt they had a claim for compensation. The Supreme Court took certiorari to consider the issues in this case; specifically:

> (1)Whether the Ninth Circuit erred in holding, contrary to the decisions of five other Circuit Courts of Appeals, that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises v. Apfel*, but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims; and (2) whether the Ninth Circuit erred in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners' takings defense, even though petitioners, as "handlers" of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.

For local governments the case raises the concern that people can violate regulations with impunity by claiming that the regulations involve a "taking" and use that claim to defend against enforcement actions. IMLA believes that we must protect against such a scenario and litigate "takings" claims in the appropriate forum in actions for compensation, rather than to justify non-compliance with regulatory measures. Our brief was authored by John Echeverria of the Vermont University Law School.

Petition Stage Case:

Senne v. Pallatine – Drivers Privacy Protection Act, Liquidated Damages, Class Actions

Like many municipalities, the Village of Palatine prints the intended recipient's name, address, and other identifying information on a parking citation before affixing that citation to an illegally parked vehicle. According to the plaintiff in this putative class action, Palatine has violated a federal statute by doing so and should be ordered to pay $2,500 in damages for each and every one of the approximately 32,000 parking tickets that it has issued over a four-year period. As a result of the Seventh Circuit's *en banc* decision allowing plaintiff's case to go forward, Palatine now faces the prospect of massive damages—as much as $80 million—for conduct that the plain text of the statute in question expressly deems permissible. The decision, if not overturned, would threaten other municipalities with crippling liability and cause countless government entities within the Seventh Circuit and beyond to change government policies dealing with everything from parking tickets to FOIA requests

Congress enacted the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2127–25, in 1994 to put an end to the then-common practice by state departments of motor vehicles of selling drivers' personal information for a nominal fee. The DPPA makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted" by the DPPA, § 2722(a), and authorizes any individual whose information is unlawfully obtained, used, or disclosed to obtain, among other things, liquidated damages of no less than $2,500, *see* § 2724(b)(1). To ensure that the DPPA would not interfere with the legitimate functions of state and local government, Congress delineated 14 permissible purposes that the general prohibition on disclosure does not reach. Those permissible purposes include disclosure "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions," and "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process." § 2721(b)(1), (4).

Plaintiff brought this suit against Palatine alleging that it violated the DPPA by including his personal information on a parking ticket left on his illegally parked vehicle, and seeking to represent a class of every person who has received a similar parking ticket from Palatine over the four years prior. The district court dismissed the case, holding that plaintiff had not alleged any "disclosure" within the meaning of the DPPA, but that even if he had, disclosure of personal information on a parking ticket would fall within the DPPA's exception "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions." § 2721(b)(1). A panel of the Seventh Circuit affirmed, holding that plaintiff had alleged a "disclosure" but that disclosure of personal information on a parking ticket is covered

by a different DPPA exception, the exception "[f]or use in connection with … the service of process," § 2721(b)(4). *See Senne v. Village of Palatine*, 645 F.3d 919 (7th Cir. 2011).

The Seventh Circuit granted plaintiff's petition for rehearing *en banc*, and the *en banc* court reversed. *See Senne v. Village of Palatine*, Slip Op. (Aug. 6, 2012). Even though the court agreed that a parking ticket "constitute[s] service of process in the administrative proceeding regarding the parking violation," and that "issuance of a parking citation is part of the function of the Village's police department," it nonetheless refused to deem disclosure of personal information on a parking ticket covered by the DPPA's exceptions for use "in carrying out [government] functions" or "the service of process." Slip. Op. 24. Relying on Congress' "overarching purpose of privacy protection," the court instead concluded that Congress only intended those provisions to apply when "all of the disclosed information actually *was used* in effectuating" a permissible purpose. Slip. Op. 24. Although the court remanded for the district court to determine, in effect, whether Palatine really needed to include personal information on its parking tickets, the court declared it "difficult to conceive, even on a theoretical level, how such information could play a role in the excepted law enforcement purposes." Slip. Op. 24.

Judge Flaum dissented. In an opinion joined by Chief Judge Easterbrook, Judge Posner, and Judge Sykes, he concluded that "[n]either the text nor the legislative history conveys Congress's intent to limit the information that may be disclosed in connection with a particular exception." Slip Op. 33. Judge Flaum also emphasized that "[t]he statute offers no guidance to the judges, lawyers, and public actors who will inevitably struggle to distinguish between necessary and extraneous information," and noted that the majority's opinion "opens municipalities up to substantial liability for incorrectly predicting" whether seemingly permissible disclosures will satisfy the court's vague "actual use" standard. Slip Op. 39–40, 43–44. Judge Posner also authored a separate dissent, in which he found "no indication that without being able to express its intention in words Congress intended to forbid police to place personal information on a parking ticket." Slip Op. 28. Like Judge Flaum, he expressed concern that the majority's opinion will expose numerous municipalities to massive liability and damages for any similar disclosures made within the DPPA's four-year statute of limitations. Slip Op. 31.

IMLA has filed an Amicus Brief supporting Pallatine's request for certiorari. Lowell Schiller and a team at Sidley Austin prepared the brief for IMLA pro bono.

Madigan v. Levin- ADEA

Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983. IMLA filed a brief in this case in support of the Illinois Attorney General. Our excellent amicus brief was authored by **Thomas J. Davis** of the **Jones Day** law firm.

Town of Greece v. Galloway – Legislative Prayer, First Amendment

Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

Mount Holly v. Mount Holly Gardens Citizens in Action – Fair Housing

(1)Whether disparate impact claims are cognizable under the Fair Housing Act; and (2) whether, if such claims are cognizable, they should be analyzed under the burden shifting approach used by three circuits, under the balancing test used by four circuits, under a hybrid approach used by two circuits, or by some other test: (a) what the correct test is for determining whether a prima facie case of disparate impact has been made; (b) how the statistical evidence should be evaluated; and (c) what the correct test is for determining when a defendant has satisfied its burden in a disparate impact case. In this case the Court has asked the Solicitor General to file a brief to help advise the court on whether certiorari should be granted.

Kiehle v. County of Cortland – First Amendment, Employee rights

Whether a government employee's truthful testimony under oath qualifies as speech "as a citizen on a matter of public concern," requiring a balancing of the interests surrounding the speech and its consequences in order to assess the constitutionality of the adverse government action.

2. October Term 2011

***Armour v. Indianapolis* – Equal Protection, Taxation, Special Assessments**

The question before the court was whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

Indiana state law (called "Barrett's Law") authorizes municipalities to fund certain public improvements by levying special assessments against a benefitted population. Under Barrett's Law, the costs are generally "apportioned equally among all abutting lands or lots."

In 2001, Indianapolis notified property owners in the Northern Estates neighborhood that their properties would be part of a new sewer project, under which their properties would be connected to the City sewer system, thereby eliminating the use of septic tanks. There was a special assessment against each parcel of around $9000. This project was one of 40 similar projects in the City. Property owners were given the option of paying the special assessment up front in full, or paying monthly over a 10- 20- or 30-year period (with interest). 31 out of the 180 affected parcels paid in full immediately.

One year later, the Council enacted a new ordinance which eliminated Barrett's Law for financing sewer projects and instituted a new program called the Septic Tank Elimination

Program ("STEP"). The Council instituted this for two reasons: 1) to battle a public health crisis because of the continued use of out-of-date septic tanks on many properties; and 2) Barrett's Law was imposing too heavy a financial burden on middle- and low- income taxpayers.

As part of the transition from Barrett's Law to STEP, the Council passed Resolution 101, which forgave all outstanding balances on the 40-plus Barrett Law projects as of November 1, 2005. Plaintiffs are the 31 landowners in the one project who paid in full and were denied a refund by the City. The lower court granted plaintiffs' motion for summary judgment on due process and equal protection grounds, and entered judgment against the City for around 400k. On appeal, plaintiffs abandoned their due process claim and the Court of Appeals affirmed the equal protection claim, finding that the City did not have a rational basis for granting relief to those who had paid up front in a lump sum.

The Indiana Supreme Court reversed. The only issue in front of the Indiana Supreme Court was whether forgiveness of all outstanding Barrett Law assessments as part of the transition to the STEP program violated the plaintiffs' rights under the Equal Protection Clause. Resolution 101 did not involve a suspect classification or exercise of fundamental constitutional rights, so the Court applied the rational basis standard ("law/policy must be rationally related to a legitimate government interest").

In short, the Indiana Supreme Court found a number of reasons why Resolution 101 would meet a rational basis standard: 1) support for low-income persons, *Kelly v. Pittsburgh*, 101 U.S. 78, 81 (1881)("Support of the poor has long been recognized as a public purpose."); 2) administrative efficiency, *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937); 3) preservation of limited resources ("the City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessments.").

In a 6-3 decision the Supreme Court affirmed. The Court reiterated that without a fundamental right or a suspect classification affected, a statute that creates distinctions must find only a rational basis for making those legislative distinctions. Just as importantly, where taxation is at issue, the courts will defer to legislative policy decisions in making those classifications. In this case, the majority concluded that moving away from the Barrett law method could be supported because the costs of collecting small payments, as little as $25, amounted to a valid administrative reason to forgive those who were still paying their debt as would the administrative cost of providing refunds to those who had previously paid. In dissent, Chief Justice Roberts responded to the majority's decision that the administrative costs supported the rational basis analysis by saying: "The Equal Protection Clause does not provide that no State shall "deny to any person within its jurisdiction the equal protection of the laws, unless it's too much of a bother.""

At argument, the abject unfairness of the policy seemed to move the conservative justices (Roberts, Scalia and Alito) and Justice Kennedy. Nevertheless, Justice Kennedy ultimately sided with the majority in finding a rational basis for the policy despite its adverse effect on some. Despite the win, local governments should be cautious in setting tax policy to consider the

equities in how a policy will be viewed as the result in this case was not certain until the opinion was released. Indeed, both the majority and dissent recognize that disparate treatment of taxpayers can go too far, for example by only collecting from the rich and declining to collect from the poor based on a theory that the costs of collection might not be worth the effort based on the return to be achieved.

IMLA submitted a brief in this case to emphasize that the City's actions meet the rational basis standard. Cities have reasonable, legitimate and even compelling reasons for differentiating between tax refunds and prospective tax relief. Indeed, Indianapolis' decision finds support in the overwhelming administrative cost differentials that exist between the two choices. While the property owners in this case had all paid up front and other property owners served by the same project had substantial amounts remaining to be paid that the city forgave, the City's policy change might well have brought a challenge by property owners of past fully paid projects and by others where only a modest amount was yet to be paid. If Equal Protection applied, would the city be required to repay all people who had funded a sewer project through an apportioned assessment? Indeed, this was part of Justice Breyer's analysis in writing for the majority – the administrative cost of reopening projects to refund those who had paid would be a nightmare. In the projects under review, would the city be required to trace each property owner who might have moved so it could provide the refund, or intervene in divorces and estates to provide a refund to feuding property owners? How far back and for how much money must the city offer skip tracing services and refunds? Simply stated, the administrative burdens are high.

This case invited the court to hold fast to its policy that political decisions ought to be challenged at the polls and not in the courts. Granted, the property owners who fully paid offer a sympathetic plaintiff, but their remedy ought to be through political action, not a federal lawsuit. We invite you to read this excellent brief at www.imla.org. ***Pro Bono Authors: Lowell Schiller, Quin Sorenson & John Meiser***

Reichle v. Howards

The issue before the court raised a very troubling question for local government – can a person who has been arrested based upon probable cause that supports the arrest nevertheless sue the arresting officer for under Section 1983 on a claim that the arrest was in retaliation for exercising First Amendment protected rights?

Mr. Howards accompanied his son to a piano recital at a mall where Vice President Dick Cheney was making an appearance. The Secret Service heard Mr. Howards say to someone on his cell phone that he was going to ask Cheney "how many kids he killed today." Howards then approached Cheney, and told him that his "policies in Iraq are disgusting." As he was leaving, Howards tapped Cheney's shoulder. The agents spoke to Howards and asked if he had touched Cheney and Howards denied doing so. Lying to a federal officer violates 18 USC §1001, a federal criminal offense. Rather than arrest him for the federal offense (which would have meant that Howards would have spent the weekend in jail awaiting bail), the officers arrested Howards for harassment, a state offense for which he made bail shortly after being processed. The District Attorney dropped the charge of harassment and Howards was never prosecuted. Mr. Howards

sued the Secret Service agents in their official and individual capacities alleging they violated his Fourth Amendment rights by arresting him without probable cause and his First Amendment rights by arresting him in retaliation for his engaging in constitutionally protected speech. The Tenth Circuit concluded that Howards Fourth Amendment rights were not violated, since the agents had probable cause to arrest, but a majority of the court concluded that his First Amendment rights had been violated.

Two Secret Service agents did not dispute they arrested Mr. Howards in retaliation for his speech to Cheney and on the phone, which was protected by the First Amendment. But the agents claimed Howards' First Amendment retaliation claim should be barred because they had probable cause to arrest him for violating 18 U. S. C. § 1001. Indeed, the agents involved in the incident that day split over what happened and they appear to have quarreled over what actually happened and whether one or some of them were lying about what occurred.

The Tenth Circuit held that probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim. The Tenth Circuit rejected extending *Hartman v. Moore,* 547 U.S. 250 (2006), where the Court held that the lack of probable cause is a necessary element to prove a retaliatory *prosecution* claim to retaliatory arrest cases. The Tenth Circuit concluded that the three factors the Supreme Court relied on to bar retaliatory prosecution claims where probable cause is present do not apply to retaliatory arrest claims.

The Tenth Circuit also denied qualified immunity to the two Secret Service agents on the First Amendment retaliation claim despite the fact the officers had probable cause to arrest Mr. Howards for lying to them.

IMLA joined a brief authored by the State and Local Legal Center which argued that the Supreme Court should bar First Amendment retaliatory arrest claims supported by probable cause because retaliatory arrest claims are easy for a citizen to allege and difficult for a police officer to disprove. If such claims aren't barred, state and local police officers may be disinclined to make lawful arrests when the First Amendment might be used by the defendant to assert a retaliatory arrest claim. The brief also argued that the agents in this case should be granted qualified immunity because the Supreme Court held in *Hartman v. Moore,* that retaliatory *prosecutions* claims are barred if probable cause supports the prosecution. Until this case, it was unclear whether the Tenth Circuit would apply *Hartman* to retaliatory arrest claims.

In an 8-0 decision (Justice Kagan recused herself), the court concluded that the officers were entitled to qualified immunity. The Court dodged the question of whether an arrest based on probable cause but in retaliation for the exercise of First Amendment rights supported a cause of action for violation of a person's rights under the Constitution. The Court as a whole noted that it had never held that there was a specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. Nevertheless, the Court noted: "we do not suggest that *Hartman*'s rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman*'s rationale could apply to retaliatory arrests. *Hartman* concluded that the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily

involve the animus of one person and the injurious action of another, 547 U. S., at 262, but in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest. Moreover, *Hartman* noted that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the "presumption of regularity accorded to prosecutorial decisionmaking."" Yet, as the Court observed "the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests."

Two of the Justices (Ginsburg and Breyer), in concurring in the judgment made clear that they would not support immunity for state and local law enforcement officers but would limit the immunity to the Secret Service. In large measure, Justices Ginsburg and Breyer seem to believe that a difference should exist between ordinary law enforcement and the unique requirement assigned to officers providing protection to public officials. In so concluding, they point to the distinction discussed by the majority that Hartman involves immunizing a person whose animus towards a criminal defendant is once or more removed from that of the officer on the scene.

We can all speculate on why the court did not answer the primary question of whether a person has a right to be free from a retaliatory arrest that is otherwise supported by probable cause. Our fear should be that the court declined to answer the question due to an equal split between the justices, as such a split would not portend well for us in the future.

Other Cases of Interest

U.S. Court of Appeals Fourth Circuit

Bowden v. Town of Cary -
Brown v. Town of Cary, No. 11-1480 (4th Cir. Jan. 22, 2013)

William Bowden, a resident of Cary, North Carolina wanted to express his unhappiness with water damage allegedly caused to his home by the Town. He scrawled the words "Screwed by the Town of Cary" in bright fluorescent orange paint across a 15-foot swathe of his home, in letters more than a foot tall. The Town notified him that his message violated the Town's sign ordinance, which prohibits fluorescent colors and limits signs to five square feet, with the exception of holiday displays and public works of art. He refused to remove the sign and sued on First Amendment grounds because the ordinance was not content-neutral.

The district court ruled for Bowen, finding that, because the ordinance made an exception for holiday decorations and public art, it necessarily required content-specific analysis to determine whether a given sign was exempt, triggering strict scrutiny review. The court enjoined enforcement of the ordinance and awarded Bowen more than $36,000 in attorney's fees. The Town appealed.

Held: The Fourth Circuit reversed. The Cary sign ordinance is content-neutral.

Discussion: The mere fact that a determination must be made as to whether a sign falls within the holiday decoration or public art exception does not invalidate the ordinance's content neutrality. The Court of Appeals reviewed its recent opinion in *Wag More Dogs, LLC v. Cozart,* 630 F.3d 359 (4th Cir. 2012), where it upheld a rule limiting the size of commercial signs while not so limiting other types of signs. That opinion had relied on the Supreme Court's treatment of content neutrality in *Hill v. Colorado* 530 U.S. 703 (2000), which eschewed a "formalistic approach" to assessing content neutrality and instead adopted a "more practical inquiry."

The Fourth Circuit stated that "content neutrality bars only one particular form of distinction—those made with a censorial intent…" In so holding, it aligned with the posture of the Seventh, Third, Sixth and Ninth Circuits--and departed from the absolutist approach taken by the Fifth, Eighth and Eleventh Circuits, which hold that content neutrality is absent if the ordinance requires any inquiry whatsoever as to content.

Under intermediate scrutiny, the Town's ordinance successfully met the requirement that it bear a reasonable relationship to its asserted purpose: traffic safety and aesthetics. The Cary ordinance placed reasonable time, manner and place restrictions "only on the physical characteristics of messages." It furthered a substantial governmental interest, was narrowly tailored, and left open ample alternate means of communication.

Reversed and remanded (including reversal of attorney's fee award).

http://www.ca4.uscourts.gov/Opinions/Published/111480.P.pdf

IMLA filed an amicus case in support of the town in this case.***Pro Bono Authors: John Baker , Patrick Flanagan , Dana Maine, et. al.***

United States Court of Appeals for the 9th Circuit

Fourth and Fourteenth Amendments – Ordinance Requiring Regular and Scheduled Street Cleaning – Unabandoned Property of Homeless – Skid Row
Lavan v. City of Los Angeles, No. 10-3761 (9th Cir. Sept. 05, 2012)

The City of Los Angeles ("City") conducts regular and scheduled street cleanings pursuant to ordinance § 56.11, which states that "No person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk". While in many areas of the City, residents no doubt appreciate these sweeps, in the "Skid Row" district where the City's highest concentration of homeless live, the City's interest in cleaning and protecting its public ways collides with its homeless residents' property interests. The city conducts the sweeps to address the excessive proliferation of abandoned personal property on the sidewalks in the Skid Row area. As part of this effort, the City blanketed the area with notices that property left on the sidewalks during these sweeps would be removed and disposed of.

Lavan and eight other homeless people living in the Skid Row district brought suit because on separate occasions between February 6, 2011 and March 17, 2011, during sweeps through Skid Row the city seized and summarily destroyed their personal possessions. Like many of Skid Row's homeless residents, the plaintiffs stored their personal possessions – including

identification documents, birth certificates, medications, toiletries, and sleeping bags – in mobile containers provided by a nonprofit called "EDARS" ("Everyone Deserves A Roof"). The plaintiffs and other homeless residents of the area often left their possessions on the sidewalks in violation of Section 56.11 and despite the notices warning them that the property could be seized and destroyed while they attended to either personal needs or personal business, such as going to the bathroom, showering, eating or finding jobs. They argued that they had not abandoned their property by doing so and claimed that in many instances the city knew that they had not abandoned this property because they or their friends were there to plead with the city that it not take the property.

On April 5, 2011, plaintiffs sued the city under 42 U.S.C. § 1983, claiming that the City's practice of "summarily confiscating and destroying the unabandoned possessions of homeless persons living on Skid Row violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution." On June 23, 2011, the district court granted plaintiffs' application for a preliminary injunction to prevent the City from seizing and destroying the plaintiffs' possessions without notice. The district court explained that the plaintiffs "have a legitimate expectation of privacy in their property", and that "[t]he property of the homeless is entitled to Fourth Amendment protection."

The district court fashioned the order to encompass ALL unabandoned property on Skid Row, reasoning that "it would be likely impossible for the City to determine whose property is being confiscated – i.e. whether it is one of the named Plaintiffs or another homeless person." The terms of the preliminary injunction bar the City from:

1) Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and

2) Absent an immediate threat to public health or safety, destruction of said property without maintaining it in a secure location for a period of less than 90 days.

The district court then enjoined the City from continuing to engage in its practice of summarily destroying plaintiff's unattended personal belongings. However, the district court made clear that under the terms of the injunction, [t]he City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash."

On Appeal, the City argued that its seizure and destruction of plaintiffs' unabandoned property implicates neither the Fourth nor the Fourteenth Amendment. The Ninth Circuit Court disagreed and affirmed the district court's decision on both counts. Interestingly, the court referred to publicity about the appeal in its decision by noting:

> "Public critics of the district court's ruling have mischaracterized both the breadth of the district court's order and the substance of the City's appeal. *See, e.g.*, Carol Schatz, "Enabling homelessness on L.A.'s skid row," *L.A. Times*, April 9, 2012; Estela Lopez, "Skid row: Hoarding trash on sidewalks isn't a right," *L.A. Times*, Feb. 28, 2012, *available at* http://opinion.latimes.com/opinionla/2012/02/skid-row-trash-

> sidewalksblowback.html. The injunction does not require the City to allow hazardous debris to remain on Skid Row, nor does the City quibble with the contours of the order. Rather, the City seeks a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left momentarily unattended in violation of a municipal ordinance."

In regards to the Fourth Amendment issue, the Court citing U.S. v. Jones, ___U.S.____(2012) distinguished between plaintiff's expectations in privacy as opposed to their possessory rights in property. In doing so, the Court reasoned that the plaintiffs need not show a "reasonable expectation of privacy" to enjoy the protection of the Fourth Amendment against seizures of unabandoned property, so long as there was some "meaningful interference" with their possessory interest in the property.

The Court drew upon a Supreme Court decision that recognized protected possessory interests in contraband when a government destroyed a quantity of an individual's white powder to test whether it was in fact cocaine. *United States v. Jacobsen*, 466 U.S. 109. (Holding that "the field test did affect respondents' possessory interests protected by the Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation of possessory interests into a permanent one.)

In *Lavon* the Court held that the plaintiffs continued to have possessory interests in their unabandoned property, and that by seizing and summarily destroying the plaintiffs' unabandoned legal papers and personal effects, the City caused a "meaningful interference" with their possessory interests in the property. The Court stated that the district court properly balanced the invasion of the plaintiff's possessory interests in their personal belongings against the City's reasons for taking the property to conclude that the City acted unreasonably in violation of the Fourth Amendment.

The Court also held that the City violated the due process clause of the Fourteenth Amendment Saying:

> "As we have repeatedly made clear, '[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir.2008). This simple rule holds regardless of whether the property in question is an Escadale or an EDAR, a Cadillac or a cart."

One of the judges dissented. Citing the city's interest in protecting the public, the dissent took exception to the majority's reliance on the homeless' property interests by recognizing that the city needed to balance those interests with those of the public using the sidewalks. The dissent characterized the problem facing the public as "a veritable maze of biohazards and trash as they go about their daily business." The dissent went on to explain that '[t]hose conditions include human waste, dead animals, and weapons. For example, during a recent clean-up, the City removed '278 hypodermic needles, 94 syringes, 60 razor blades, 10 knives, 11 items of drug paraphernalia,' and '[t]wo 5- gallon buckets of feces.' " Further putting into perspective the

massive problem facing city officials, the dissent cited to an article that mentioned that one sweep in July amassed 5 tons of material.

While all of us can sympathize with the plight of the homeless, as did the dissent, this case creates hurdles for local governments in trying to balance the interests of some residents against others by weighting the balance against those in business and against reasonable solutions by elected city leaders.

http://www.ca9.uscourts.gov/datastore/opinions/2012/09/05/11-56253.pdf

United States District Court for the Southern District New York

***Ligon v. City of New York*, 12 civ. 2274 (S.D.N.Y. Jan. 08, 2013)**

Under New York's so-called "Clean Halls Program" owners and property managers of private residential buildings could request that police officers patrol their properties and arrest trespassers. The New York Police Department (NYPD) patrolled thousands of buildings, routinely stopping and frisking a broad swath of people without any reasonable suspicion that they were trespassing. Plaintiff Jeneane Ligon's 17-year old son was stopped without cause while on an errand to purchase groceries.

Held: The US District Court for the Southern District of New York held that the NYPD's practice of stopping and frisking people without a reasonable suspicion that they were trespassing violated the Fourth and Fourteenth Amendment. Judge Shira Scheindlin ordered that the NYPD refrain from any more trespass stops and set a hearing for January 31 to determine what other relief could be granted.

Discussion: New York's stop and frisk policy was implemented more than 20 years ago to rebuff spiraling criminal activity. The stop and frisk statistics are stark. Between 2004 and 2009, a total of more than 2.8 million people were stopped by the NYPD. In 2011, that number ballooned to 685,000. And in the first calendar quarter of 2012 alone, over 200,000 people were stopped.

The policy is heralded by City officials as reducing crime but has repeatedly run afoul of the Constitution. This was not the first confrontation between stop-and-frisk and Judge Scheindlin. A decade ago, she authored the decision *Daniels v. City of New York*, 138 F. Supp. 2d 532 (S.D.N.Y. 2003), finding that the policy was rife with racial profiling and requiring that the NYPD adopt comprehensive record keeping and training policies to track and remediate the problem.

Eight years later, she wrote the opinion in *Floyd v. City of New York*, 813 F. Supp. 2d 413 (S.D.N.Y. 2011), a case confirming that, despite robust affirmations from the NYPD that changes had been made, racial profiling and related constitutional deficiencies still permeated the program. That decision gave rise to another *Floyd* in May 2012, this time a class action against the NYPD and the City, certified by Judge Scheindlin. It was based on empirical evidence that 50% of all stop and frisk activity involved blacks, 30% involved latinos and only 10% involved whites (*Floyd v. City of New York*, No. 8 civ 1034 (May 16, 2012)).

http://www.nysd.uscourts.gov/cases/show.php?db=special&id=253

Villegas v Metro. Gov't of Nashville, No. 11-6031 (6th Cir. Mar. 04, 2013).

Juana Villegas was unable to produce a driver's license during a traffic stop in Nashville. She was arrested and taken to a jail operated by the Davison County Sheriff's Office, where an immigration check determined that she was not lawfully in the United States. Villegas was nine months' pregnant. A few days after being incarcerated, her delivery began and she was taken to a nearby hospital to give birth. Due to her immigration status, she was classified as a medium-security inmate. Jail authorities therefore required that one of her legs be shackled to the hospital bed except for two hours before delivery and five hours thereafter. When Villegas left the hospital to return to the jail, officers refused to let her bring a hospital-issued breast pump because of safety concerns.

She sued the Metropolitan Government of Nashville (Nashville) under Section 1983 and the Eighth and Fourteenth Amendments. Although technically a due process claim, Villegas needed to show deliberate indifference to her needs in order to support Eighth Amendment claims. The United States District Court for the Middle District of Tennessee granted her motion for summary judgment and the case proceeded to trial on damages and the jury awarded her $200,000.

HELD: On appeal, the Sixth Circuit reversed and remanded. Plaintiff had not fulfilled her burden of establishing that there was no genuine issue as to any material fact regarding the threat to her health.

DISCUSSION: "Deliberate indifference" in the context of an Eight Amendment-based Section 1983 claim requires both an objective showing that the plaintiff was in fact subjected to a substantial risk of serious harm that society chooses not to tolerate and a subjective showing that the defendant was aware of that risk and chose to ignore it.

In terms of the objective question--"Did the shackling create an unreasonable health risk?"--the Circuit Court found ample policy statements and precedents condemning the use of leg irons during pregnancy. But even these were not absolute: except during the delivery itself, when shackling undeniably created an unwarranted health risk, publications from sources such as the United Nations, Amnesty International and the American Medical Association stated that shackling might be justified where the mother presented a credible risk of flight. And competing testimony was introduced by experts as to the degree of risk created by shackling.

Answers to the subjective question-- "Was the jail staff aware of the risk and chose to disregard it?"--were also cloudy. Some evidence showed that the officers were aware of a "do not shackle" order issued internally by hospital ob/gyn staff; however, it was unclear that the officers had actually seen the order.

Plaintiff's breast pump claim was more easily dispatched. It had not been prescribed by the hospital and there was no evidence that a layperson would understand it to be medically necessary.

The Appeals Court remanded, with instructions that a jury determine whether Villegas was a flight risk and whether the shackling in fact posed a serious health risk and whether the Defendants knew of that risk.

http://www.ca6.uscourts.gov/opinions.pdf/13a0059p-06.pdf

County Cannot Recover for Costs Incurred in Responding to Mass Accident
County of Erie v. Colgan Air, Inc., No. 12-1600-cv (2d Cir. Mar. 04, 2013)

On February 12, 2009, a Continental Connection Airlines flight crashed into a residence while on approach to Erie County's Buffalo-Niagara International Airport. All passengers and crew as well as a resident in the house were killed. The crash caused substantial damage to neighboring properties and resulted in significant costs. The County identified "unprecedented" expenses it incurred, including overtime pay for police and emergency personnel; clean-up and removal of human remains; remediation of chemical substances from the airplane; leasing and purchase of equipment to respond to the crash; provision of emergency and counseling services to the decedents' families, and so on.

The County sued Colgan Air, Continental Airlines and Pinnacle Airlines to recover its costs in cleaning up after the accident. The US District Court for the Western District of New York granted defendants' motion to dismiss because New York law does not allow for recovery of public expenditures made in performing governmental functions. The County appealed.

HELD: The Second Circuit affirmed the lower court's grant of defendant's motion to dismiss.

DISCUSSION: The well-settled law in New York is that public expenditures made by governmental entities in the performance of governmental duties are not recoverable from private entities. In a leading case, *Koch v. Consolidated Edison Co. of N.Y.*, 62 N.Y.2d 548 (1984), New York City experienced a 25-hour blackout which caused havoc. The City attempted to recover costs and expenses for additional police, fire, sanitation, hospital and other personnel necessitated by the blackout. New York's highest court rejected the claim, citing a variety of cases involving a nuclear accident, and oil spill and other cataclysms.

The logic for the law is that the cost of protection from fire or safety hazards should generally be borne by the taxpaying public at large rather than being visited on a specific tortfeasor.

Although New York has relaxed prohibitions against individual firefighters and police officers from recovering damages for injuries caused by others, it has done so by specific statutes; the state legislature has shown no such inclination with respect to municipalities. Similarly, although New York state law does provide for reimbursement where the municipality must

suppress or remove a "public nuisance," an airplane crash could hardly be said to fulfill the elements a nuisance, which involves "a continuing or recurrent problem…"

In the case of such a recurrent of continuing problem, the duty to remediate is on the party who caused the nuisance. "When the government responds to a catastrophic accident; however, it performs its own duty of responding to a discrete public emergency—not a duty on behalf of or in place of a third party." (citations omitted).

http://www.ca2.uscourts.gov/decisions/isysquery/3950a5e4-a4b0-46c3-ba58-b3881ec69fb8/6/doc/12-1600_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/3950a5e4-a4b0-46c3-ba58-b3881ec69fb8/6/hilite/
(last accessed March 6, 2013)

Arizona Law Regulating Free Speech of Day Laborers to Solicit Work in Traffic is Likely Unconstitutional
Valle Del Sol Inc. et al. v. Whiting et al., No. 12-15688 (9th Cir. Mar. 04, 2013)

Laws that limit commercial speech must not be more extensive than necessary to serve a substantial government interest.

Following several years of deliberation, the State of Arizona passed a comprehensive immigration reform bill, S.B. 1070. In May of 2010, plaintiffs/appellees filed suit in the US District Court for the District of Arizona seeking a declaration that S.B. 1070 was unconstitutional in its entirety. A month later, plaintiffs moved for a preliminary injunction, arguing that two specific provisions of S.B. 1070 violate the First Amendment. These provisions, known collectively as the day labor provisions, make it unlawful for a motor vehicle occupant to hire or attempt to hire a person for work at another location from a stopped car which impedes traffic (Section 5A), or for a person to be hired in such a manner (Section 5B).

Defendants argued that the day labor provisions serve the government's substantial interest in traffic safety, while plaintiffs argued that this asserted interest is a sham, and that the true purpose of the day labor provisions is to remove a specific group of citizens from public view and to suppress their economic opportunities.

In February 2012 the district court issued a preliminary injunction, barring enforcement of the day labor provisions. The court held that the plaintiffs were likely to succeed on the merits of their First Amendment claim because the provisions were insufficiently tailored to the direct advancement of the State interest in traffic safety. It also found that the remaining requirements for a preliminary injunction (irreparable harm, balance of the equities and public interest) had been met.

Held: The Ninth Circuit found that the district court correctly determined that, although Arizona has a significant governmental interest in promoting traffic safety, the day labor provisions fail the requirement that restrictions on commercial speech be no more extensive than necessary to serve that interest. Therefore, the Ninth Circuit held that district court did not abuse its discretion and affirmed.

Discussion: The Circuit Court reasoned that more than the mere invocation of a significant government interest is needed before First Amendment rights can be restricted. Rather, the benefits imparted by the restrictions must be balanced against the burden imposed on the protected speech. The balancing of these interests depends on what type of speech is being regulated.

The court held that the day labor provisions were content-based restrictions on commercial speech. The provisions impacted commercial speech (rather than "core" First Amendment speech as plaintiffs had argued) because the primary purpose of soliciting work as a day laborer was to advertise the laborer's availability for work and negotiate a price. The provisions were content-based: they targeted labor-solicitation speech while leaving unaffected other types of street solicitation, thereby undermining an argument that their primary purpose was to promote the broader goal of traffic safety. This purpose was evident in the omnibus immigration bill, S.B. 1070, in which the day labor provisions appeared. It expressly states that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

Arizona's impermissibly disproportionate concern with this type of speech was also evident in its punishment: Whereas conduct that *recklessly* impeded traffic was punishable by 30 days' imprisonment, day labor solicitation that was not reckless carried a penalty of up to six months in prison.

The Ninth Circuit concluded that the day labor provisions were likely unconstitutional restrictions on First Amendment free speech rights by using the four-part test from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The Court found that: (1) day labor solicitation was neither misleading nor related to unlawful activity and therefore deserved First Amendment protection; (2) Arizona had shown the requisite substantial governmental interest (in traffic safety); and (3) Arizona had also shown that the day labor provisions did directly advance the State's interest in traffic safety by reducing pedestrians and slow-moving traffic in the streets. However, Arizona failed the fourth prong of the *Central Hudson* test, because they imposed a greater restriction on speech than was necessary to serve the State's interest in traffic safety. Ironically, the Circuit Court found that the day labor statutes were actually *underinclusive* if their true intent was to promote traffic safety.

The court pointed out that Arizona could have advanced its interest in traffic safety directly, without reference to speech. The availability of such obvious and less restrictive alternatives made the day labor provisions constitutionally suspect.

http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/04/12-15688.pdf (last accessed March 6, 2013).

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.

IMLA can provide amicus support to local governments through the resources that members provide. If your community is not a member of IMLA, we ask that you join so that we can continue to provide advocacy on your behalf in cases like these. We cannot take every case, but we hope we will be around when you need us and will have the resources to help you. So join now and help insure our success on your behalf and that of local governments across the United States. If you have any questions about membership or any of our programs, please contact me at cthompson@imla.org or at 202-742-1016.