

IMLA In Full Stride

By Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

IMLA filed an amicus brief in *Franchise Tax Board of California v. Hyatt*, a petition-stage Supreme Court case. In *Hyatt*, a former resident of California moved to Nevada after he had earned hundreds of millions of dollars in licensing fees during the time that he lived in California. In 1993, the Franchise Tax Board of California (FTB) audited his California tax returns and concluded that he owed the state millions in unpaid income taxes, interest, and penalties. The former California resident responded by filing suit against FTB in Nevada state court, alleging that FTB had committed fraud, intentional infliction of emotional distress and other torts in the course of the audit. The Nevada Supreme Court upheld a jury verdict against FTB.

This case had previously been before the US Supreme Court in 2003, *see Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003) (*Hyatt I*). In *Hyatt 1*, the FTB argued that because California law gave it complete immunity for claims arising from tax administration, the Full Faith and Credit Clause required Nevada to respect that immunity. The Supreme Court held that the Nevada courts were not required to apply California law giving FTB complete immunity; instead, they could hold FTB liable to the same extent that a comparable Nevada government entity would be liable, "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark." That case recognized that "States' sovereignty interests are not foreign to the full faith and credit command," and signaled that a state may not "exhibit[] a 'policy of hostility to the public Acts' of a sister State." 538 U.S. at 499.

The case was then remanded and after the jury awarded Hyatt hundreds of millions of dollars in damages the decision was again appealed. Relevant to our purposes, this time the Nevada Supreme Court held that the discretionary-function immunity for a governmental entity and its employees was not applicable in this case because the Nevada Court recognizes an exception to that immunity for bad-faith conduct. The Nevada Supreme Court also held that FTB was not entitled, under principles of comity, to the Nevada statutory cap on damages that is available to Nevada governmental entities. The court concluded that allowing FTB to utilize the damages cap would violate Nevada's public policy because the state's interest in providing relief to its citizens outweighs the principles of comity.

In support of FTB's petition for certiorari, IMLA's brief focuses on the issue of discretionary function immunity and how narrowing the scope of that immunity will impede local governments' functionality and harm the public interest. IMLA argues that given the nature and scope of municipal activities, local governments are particularly susceptible to intentional tort claims--and by carving out an exception to the immunity for bad-faith conduct the court threatens municipalities' policymaking abilities for the critical services that municipalities provide. Moreover, the nature of intentional tort claims will necessarily make these lawsuits extremely costly both in terms of distraction from government officials' duties and from a monetary standpoint. Further, IMLA argues that the erosion of the immunity in these cases will likely dissuade talented and bright individuals from entering public service.

IMLA also submitted amicus briefs both at the petition-stage and merits-stage in two cases that were recently decided by the Supreme Court: *City and County of San Francisco v. Sheehan* and *Comptroller of the Treasury of Maryland v. Wynne.*

In *City and County of San Francisco v. Sheehan*, two police officers were called by a social worker to take Sheehan into custody for an involuntary mental evaluation after she had threatened a social worker with a knife. When the officers arrived, they opened the door to Sheehan's residence and she threatened to kill them and brandished a knife. They closed the door to her residence and called for backup. However, they then made the determination to reenter her residence before backup arrived to effectuate the arrest, in order to prevent Sheehan from harming herself or others. When they reentered, Sheehan rushed them with a knife. The officers tried to use pepper spray to stop her and when that didn't work, they shot her several times. She survived and sued under 42 U.S.C. § 1983 and the ADA.

The Ninth Circuit concluded that the first entry was lawful (under the warrantless search exemption to render emergency assistance or respond to exigent circumstances) as was the officers' ultimate use of deadly force under the circumstances. However, the Ninth Circuit held that the officer's second entry into Sheehan's residence was unlawful under both the Fourth Amendment and ADA. The court held that the second entry was unreasonable under the Fourth Amendment, on the basis that it was unreasonable to make an otherwise lawful entry when the officers could have desisted from their efforts to arrest Sheehan in light of her resistance and mental illness, and used different tactics that might have resulted in a different outcome. Regarding Sheehan's claim under the ADA, the Ninth Circuit held that the "reasonable accommodation" requirement of Title II of the ADA applies to officers' conduct in the course of an arrest – including an arrest of a violent individual like Sheehan. The court further held that the

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not it would continue to use Donovan or rely on and use its internal legal employees as city prosecutors. In 2010 Donovan was advised in writing that Montreal was going to use its full time lawyers to act as Municipal prosecutors, and his services would no longer be needed. Donovan alleged that Montreal had no right to terminate his services since it had to respect the resolution adopted on June 2, 1992 by Westmount, confirming that the latter retained his services as a Westmount Municipal Court prosecutor. Donovan also argued that if he was to be terminated, Montreal had to give him appropriate notice before terminating his service.

HELD: Motion Dismissed.

DISCUSSION: The Court held that Montreal was able to terminate the services of Donovan. At the time Montreal terminated Donovan's services, the Westmount resolution was obsolete. The Court relied on the *Act Respecting the Exercise of Certain Municipal Powers In Certain Urban Agglomerations,* which delegated to Montreal the competence concerning municipal court affairs. Furthermore, the agreement relating to the delegation of activates of penal proceedings before Montreal Municipal Court signed by Westmount in 2006 permitted Westmount to use the services of prosecutors other than those used by Montreal-but Westmount had never subsequently retained the services of Donovan. It was Montreal that continued to retain Donovan, and therefore Montreal was able to put an end to Donovan's services.

With regards to notice, the Court indicated that Donovan was terminated because Montreal decided to use its own employees to act as Municipal Court prosecutors. Therefore it is clear that Donovan was not Montreal's employee. The Court agreed with the position put forward by Montreal that Donovan was bound by a service contract and was subject, as any lawyer, to the *Code of Ethics of Advocates*. The Code of Ethics provides that a lawyer may not, at any time, limit the right of the client to consult another lawyer. Montreal argued that requiring a client to give his lawyer prior notice of termination of service would be in violation of the client's right to choose his lawyer. ML

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to self-defense outside the home. The Second Circuit grudgingly "assumed" that such a right may exist—but proceeded to uphold a restrictive "proper cause" permitting scheme by applying intermediate scrutiny in the form of an "interest-balancing test:"

> Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest."

Freed of the requirement to find narrow tailoring, the Second Circuit determined that maintaining public safety was an important governmental interest and the New York "proper cause" process served that interest– in stark contrast to the recent DC Circuit analysis in *Wrenn*.

High Court Reprise? *Heller* and *McDonald* resolved narrow questions about gun possession—and left many other questions unanswered. Subsequent interpretations of those decisions and their implications for limits on firearms, whether in the home or in public, have diverged widely, as evidenced in *Wrenn, Peruta, Moore, Kachalsky, Jackson* and other Circuit Court holdings. While the general momentum is shifting unmistakably towards less restriction on the right "to keep and bear arms," the real meaning of the Second Amendment will clearly require continuing explication by the Supreme Court. ML

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issue of the reasonableness of the accommodations proposed after this incident by Sheehan's litigation expert (i.e., that the officers should have allowed Sheehan to remain in her "comfort zone" until they were able to calm her down), was one for the jury.

The Supreme Court granted certiorari on two issues: (1) whether the ADA requires police officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of an arrest; and (2) whether it was clearly established for the purposes of the Fourth Amendment that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable due to the anticipated resistance of an armed and violent suspect within the residence.

IMLA's brief argued, among other things, that individual police officers should not be required to perform an analysis regarding what accommodations are necessary under the ADA, but rather, police should be afforded broad discretion in these circumstances.

In a 6-2 opinion, the Court dismissed the first issue regarding the ADA as improvidently granted, declining to rule on an important issue for local governments.

Regarding the Fourth Amendment issue, the Court noted that the "real question" was "whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability." Despite having reframed the question presented on the Fourth Amendment issue, the Court declined to rule on this constitutional question. The Court instead rested its holding on the fact that the law was not clearly established at the time of the events, thereby entitling the officers to qualified immunity. In so holding, the Court reversed the decision of the Ninth Circuit, admonishing that it has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established at a high level of generality... Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures." The Court explained that under the circumstances, a reasonable officer could have concluded that the second entry into Sheehan's home was justified both under the continuous search rationale and the exigent circumstances rationale.

The second case decided by the Court on May 18, 2015 in which IMLA had participated as an amicus was *Comptroller of the Treasury of Maryland v. Wynne.* In *Wynne,* local governments were dealt a loss by the Court when it held that Maryland's tax scheme was unconstitutional under the dormant Commerce Clause.

The Maryland tax scheme at issue had two components: a state tax and a county tax. The county tax is based on where the individual is domiciled and maintains a principal residence. Maryland provides residents who pay income tax to another jurisdiction for income earned in that other jurisdiction a credit against Maryland state taxes, but Maryland does not provide a credit against its county taxes. Nonresidents

who earn income from sources within Maryland must pay the state income tax as well as a "special" nonresident tax in lieu of the county tax. The result of Maryland's tax structure is that some Maryland residents who earn income outside the state may be subject to so-called double taxation because a credit is only offered on the state tax and not on the county tax.

In a 5-4 opinion, writing for a sharply divided Court, Justice Alito concluded that Maryland's personal income tax scheme violates the dormant Commerce Clause. The majority concluded that Maryland's tax structure creates a risk of double taxation, is inherently discriminatory and that it fails the "internal consistency" test. The majority noted that the state's tax scheme operates as a tariff, which the Court concluded is "fatal because tariffs are 'the paradigmatic example of law discriminating against interstate commerce.'" The Court explained that Maryland's tax scheme "fails the internal consistency test because if every State adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce."

The Court brushed aside arguments made by the Solicitor General (which were also advanced by IMLA and other state and local government groups) that residents of a county reap the benefits of local government services, like schools, roads, and police and fire services, and a state should therefore have the ability to tax the income of residents for those services, regardless of where that income was earned.

In the principal dissent, Justice Ginsburg argued that the dormant Commerce Clause does not invalidate a tax scheme where the discriminatory effect results from the operation of two otherwise lawful tax statutes. She also argued that it is well-established that states have the authority to tax all of their residents' income, wherever earned, and that it is a policy decision that should be left to the states and Congress to decide whether they want to offer tax credits for income that is taxed by other states. She concluded by noting that the Court is ill equipped to make these types of policy decisions.

The dissent brought together an unlikely confederation. Joining Justice Ginsburg were Justices Kagan and Scalia. Justice Scalia also wrote his own dissent arguing that the dormant Commerce Clause does not exist, because the Constitution says nothing about prohibiting state laws that burden interstate commerce. Justice Thomas joined the Scalia dissent and issued his own, arguing that even if there is a "dormant" Commerce Clause, it could not have been intended to apply in this manner. **ML**

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