

Municipal Lawyers and the SCOTUS 2014 To Do List

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

The 2014 Supreme Court Term will be remembered for its landmark decisions in *Obergefell v. Hodges* and *King v. Burwell,* requiring a state to license a marriage between two people of the same sex and upholding the Affordable Care Act's subsidies in all fifty states, respectively. And while those cases are certainly important–and indeed historic—they may overshadow other decisions this Term that will have significant impacts on local governments. At least two cases will require most municipalities around the country to rewrite ordinances, and other cases may require new training for law enforcement and a review of policies at municipal correctional facilities.

Sign Ordinances: Without a doubt, the most significant case for municipal governments this Term was *Reed v. Town of Gilbert.* In fact, this case may have produced the most significant decision for local governments in years, as it will require almost every municipality in the nation to revisit and likely rewrite their sign ordinances.

In *Reed*, after receiving an advisory notice that its signs announcing the time and location of church services were displayed for a longer time period than the Town's Sign Code allowed, the Good News church sued the Town claiming the Sign Code violated the Free Speech Clause of the First Amendment. The Town's Sign Code placed signs in various categories: temporary directional signs related to qualifying events, political signs, and ideological signs. The church did not have its own dedicated building and held services at various locations around the Town. They were categorized under the Sign Code as temporary directional signs and as such received less favorable treatment (in terms of allowable size, location, duration, etc.) than political signs and ideological signs.

IMLA joined an amicus brief submitted by the State and Local Legal Center arguing that the Town's Sign Code was content neutral and further, that if the mere categorization of signs by their function renders them "content-based," then few sign regulations across the country would meet an exacting strict scrutiny test. The Court disagreed and held that the Sign Code's provisions were content-based regulations of speech that do not survive strict scrutiny. The Court found that the Sign Code was content based because it drew distinctions among types of signs "on its face." Accordingly, there was no need to assess the Town's justifications or purposes for enacting the provisions in order to determine what level of scrutiny to apply. After finding that the Sign Code was content-based, the Court had no problem concluding that its scheme of differential treatment of various types of signs could not survive strict scrutiny because, according to the Court, those distinctions were highly underinclusive.

While Justice Thomas, writing for the majority, indicated that this decision may "sometimes" result in "entirely reasonable" laws being struck down because they are content-based," notably, he also states:

An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers -*e.g.*, warnings signs marking hazards on private property or signs directing traffic - might also survive strict scrutiny." (emphasis added).

There were three concurrences filed with the majority, and three Justices concurred in the judgment only, including Justice Kagan. She, and at least two other Justices who joined her concurrence, viewed the ruling as far more sweeping than the majority implied, quipping at one point that the Court "may soon find itself a veritable Supreme Board of Sign Review." She also noted that:

The consequence-unless courts water down strict scrutiny to something unrecognizable-is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.

In his separate concurrence, which was joined by two other Justices, Justice Alito offered a non-comprehensive list of sign ordinances that municipalities may now enact, at least in his view, in light of the majority's opinion. However, municipal attorneys would be wise to consider whether his concurrence is truly in line with the majority's opinion before simply crafting a new sign ordinance based on that list. For example, in his litany of potentially acceptable regulations, Justice Alito included the following: "Rules distinguishing between on-premises and off-premises signs." And while local governments may be hopeful that such a distinction would be acceptable, under the majority's ruling, it is difficult to know how one can distinguish between on-premises and off-premises signs without using the sign's content.

Law Enforcement Cases: In addition to *Reed,* there were a number of other decisions that also may require your immediate attention. These include a handful of police cases. In the past, local governments have generally fared well in law enforcement matters before the Court. However, this Term, the victories for local governments were minor. One was *Hein v. North Carolina,* which held that an officer's reasonable mistake of law does not establish a Fourth Amendment

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violation where the officer makes a traffic stop based on that reasonable mistake of law. And while the officers in *City of San Francisco v. Sheehan* were granted qualified immunity after shooting a mentally unstable woman, the Court dismissed the ADA issue in that case as improvidently granted, leaving that question for another day.

The major law enforcement cases this Term were losses for municipalities. *Rodriguez v. United States,* which held that a "police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," is fairly straightforward and likely only requires some additional training for police officers. However, *City of Los Angeles v. Patel* is more significant as it will require municipal attorneys to go back and review and potentially rewrite not only their hotel registry ordinances, but perhaps other related ordinances as well.

Hotel Registries: The questions presented in *Patel* were as follows: (1) Whether facial challenges to ordinances and statutes are permitted under the Fourth Amendment; and (2) whether a hotel has an expectation of privacy under the Fourth Amendment in a hotel guest registry where the guest-supplied information is mandated by law and an ordinance authorizes the police to inspect the registry, and if so, whether the ordinance is facially unconstitutional under the Fourth Amendment unless it expressly provides for pre-compliance judicial review before the police can inspect the registry.

This case involved Los Angeles Municipal Code § 41.49, which, like many other ordinances around the country, required hotel and motel operators to keep specific information about their guests like their name, address, room number, and information about their vehicle parked at the hotel. Section 41.49 also states that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection." In a facial challenge to the ordinance, motel operators objected to § 41.49 authorizing warrantless inspection of guest records.

In a 5-4 opinion, the Court held that facial challenges under the Fourth Amendment are not categorically barred or even especially disfavored. Regarding the ordinance in question, the Court held that the ordinance requiring hotel operators to record and keep specific information about their guests on the premises for a ninety-day period and to make those records available to "any officer of the Los Angeles Police Department for inspection" on demand, is facially unconstitutional because it fails to provide the operators with an opportunity for pre-compliance review. According to the Court, all police officers need to do to make sure that a search of a hotel registry is constitutional is issue a subpoena.

IMLA joined a brief filed by the SLLC, which pointed out that mobile home parks, second-hand dealers like pawnshops, scrap metal dealers, and massage parlors are also subject to registration and inspection laws and ordinances. Whether police inspection of registries for these types of businesses will also require a subpoena in the future is an open question following the *Patel* decision.

Prisoners and Detainees: Two other law enforcement cases this Term, *Kingsley v. Hendrickson* and *Holt v. Hobbs,* both arose in the prison context. The Court held in *Holt* that the prison's grooming policy prohibiting beards violated the Religious Land Use and Institutionalized Persons Act because it prevented an inmate from growing a half-inch beard in accordance with his religious beliefs. In *Kingsley*, the Court held that the proper standard for excessive force claims under the Fourteenth Amendment for pre-trial detainees was an objective standard and that plaintiffs need not show that officers were subjectively aware that their use of force was unreasonable. Unlike *Reed* and *Patel,* neither of these cases will likely require much upfront work for municipal attorneys, however, both will potentially result in more litigation and perhaps require attorneys to review their municipality's policies.

IMLA will be working on model ordinances to help local governments comply with the *Reed* and *Patel* decisions. For more information about those model ordinances, please email cthompson@imla.org. IMLA will also have more than one program addressing the *Reed* decision at our Annual Conference in Las Vegas this fall. So if you haven't already done so, register now!



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