

The Year In Review

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

IMLA's advocacy activity over the past year continued in full stride. In 2015, we filed nearly thirty amicus briefs on behalf of our members, including eight Supreme Court merits briefs and seven Supreme Court petition stage briefs.

While we are still awaiting the results of a number of the petitions for certiorari that we filed, our petition in *Franchise Tax Board v. Hyatt* was granted and the Supreme Court heard oral argument in December 2015. We were also active at the federal and state appellate court level, filing briefs in the First Circuit, Third Circuit, Ninth Circuit, Tenth Circuit, California Supreme Court, Illinois Supreme Court, Ohio Supreme Court, Oregon Supreme Court, Tennessee Supreme Court, Texas Supreme Court and the California Court of Appeal. The issues in these cases were as varied as the courts we filed in, ranging from the use of statistics in a disparate impact claim to issues under the First Amendment pertaining to buffer zones and sign ordinances. We are still awaiting the outcome in most of these cases.

December 2015 and January 2016 were particularly active. In these two months alone, we filed amicus briefs in three petition stage Supreme Court cases and one Supreme Court merits case, and have a number of other briefs in the works before the nation's highest court as well as in state and federal appellate courts. The cases are all of importance to municipal governments and cover a wide range of issues, including everything from privity to appellate jurisdiction over qualified immunity cases and many more.

Below is a small sampling of the more recent cases in which we have recently filed amicus briefs on behalf of IMLA members:

Wasatch County v. Ute Indian Tribe, a Supreme Court petition-stage case, involved a long tortured litigation history between the state of Utah, some of the counties in Utah, and a Native American tribe--the Ute Indians. The underlying dispute revolved around defining the boundaries of Ute Indian reservation. The facts of this case were complicated and largely irrelevant for IMLA's purposes.

What was relevant for IMLA and its members, is that the Tenth Circuit enjoined Wasatch County from prosecuting a member of the Ute Indian Tribe based on an exception to the Anti-Injunction Act that permits enjoining a state court proceeding to enforce a prior federal court judgment. Notably, however, the County was not a party to the prior case (which did not even produce an enforceable judgment as the parties settled). The Tenth Circuit nonetheless held that *every* county was in privity with the State of Utah, which had been a party to the prior suit even though there was no evidence that the State had litigated the prior litigation with Wasatch County's interests in mind. To the contrary, the State settled with the Tribe and the County received nothing for that settlement. On this privity point, the Tenth Circuit noted "[i]t's not just parties who are bound by prior decisions: those in privity with them often are too, and counties are usually thought to be in privity with their states for preclusion purposes when the state has lost an earlier suit." (emphasis added).

IMLA submitted an amicus brief which focused solely on this narrow privity issue. In its brief, IMLA highlighted the circuit split created by the Tenth Circuit's ruling on the question of whether a municipality should generally be held to be in privity with a state for preclusion purposes. IMLA argued that the Tenth Circuit got the rule backward, and that it is the rare case (and not the general rule) that a municipality is in privity with a state and bound by judgments to which the municipality was not a party. Any such showing requires a fact-intensive inquiry to support the unusual finding, which the Tenth Circuit had not done.

IMLA's amicus brief also noted the tremendous waste of taxpayer's resources which would result from the Tenth Circuit's ruling, because it will require municipalities to monitor all litigation involving the state and intervene where necessary. Such an endeavor would be at best an extremely costly endeavor for municipalities and would likely be impossible for most.

On January 22, 2016, IMLA filed another petition-stage Supreme Court brief in *Blanchard v. Brown*. The issue in *Blanchard* is whether a circuit court must accept a district court's conclusion that there are genuine disputes of material facts. IMLA's brief in this case did not argue for overruling *Johnson v. Jones*,

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require that "reasonable accommodations" be made for service animals. And the Department of Justice has explicitly said that places "that prohibit specific breeds of dogs must make an exception for a service animal of a prohibited breed."

This issue was recently litigated[6] in Aurelia, Iowa, and the federal court found that between a municipality's BDL and federal law, the law of the land trumps the local ordinance.

7. BDL is based on long-disproven stereotypes, myths and junk data. The fact is, many of these ordinances were passed decades ago before any accurate data was available. Couple that with panic policymaking and you end up with ineffective and discriminatory laws that do nothing to actually keep communities safe.

A 2013 peer-reviewed study[7] in the Journal of the American Veterinary Medical Association examined every dog bite-related fatality over a 10-year period (2000-2009) and found that breed could only be accurately determined 17 percent of the time. And of that 17 percent, 20 breeds and two known mixes were identified. The study concluded that most dog bite-related fatalities were characterized by "coincident, preventable factors; breed was not one of these."

8. BDL is not publicly supported. Recent polling found that 84 percent of respondents think that responsible dog owners should be allowed to own whatever kind of dog they want, without the government arbitrarily restricting that right.

Not to mention, organizations like the American Bar Association, the Centers for Disease Control and Prevention, the American Veterinary Medical Association, the National Animal Care and Control Association and the American Kennel Club have all publicly rejected BDL.

Taken together, it's no wonder that 19 states have passed laws prohibiting breed discrimination on the local level, and hundreds of municipalities have rejected or repealed BDL.

9. BDL runs counter to the central tenets of community policing. There are tens of millions of pet dogs in our communities, making it vital for our police to be well-trained and well-equipped to safely and humanely deal with the countless dog encounters they're going to have. At the same time, the community should always feel safe in calling on the police when help is needed.

The fact is that BDL interferes with this relationship and makes it difficult to accomplish successful community policing. These arbitrary dog laws force responsible dog lovers underground and erodes their trust in government and the police.

To help improve community policing, the Department of Justice's Office of Community Oriented Policing Services (COPS), in partnership with Best Friends Animal Society and others, released "The Problem of Dog-Related Incidents and Encounters"[8] to help strengthen public and officer safety, and to consider the needs and demands of the community.

10. BDL violates the principles that make America great.

Our laws should focus on keeping us safe and protecting the community. We don't want or need the government telling responsible pet owners what kinds of dogs they can own.

Notes

1. http://www.nbcnews.com/id/31505216/ns/health-pet_health/t/poll-americans-consider-pets-part-family/#.VrEdyi0o6Cp (last accessed Feb. 2, 2016).
2. National Canine Research Council. (2013). *Denver's Breed-Specific Legislation: Brutal, Costly, and Ineffective.* Retrieved from:http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Denver%20BSL%20Brutal,%20Costly,%20and%20Ineffective%20_%20Aug%202013.pdf (last accessed Feb. 2, 2016)
3. http://bestfriends.guerrillaeconomics.net/ (last accessed Feb. 2, 2016).
4. *Nelson v. Town of New Llano*, No. 2:14-cv-803 (W.D. La. Jul. 1, 2014) (enjoining anti-pit bull ordinance).
5. http://www.al.com/news/birmingham/index.ssf/2014/09/city_of_clays_vicious_dog_ordi.html (last accessed Feb. 2, 2016) (Birmingham, Alabama breed specific law held to be unconstitutional).
6. *Sak v. City of Aurelia*, 832 F.Supp.2d 1026 (N.D. Ia. 2011) (enjoining anti-pit bull ordinance as applied against a disabled veteran and his pit bull service dog, where the 5-year old dog had never manifested any aggressive behavior).
7. http://avmajournals.avma.org/doi/abs/10.2460/javma.243.12.1726 (last accessed Feb. 2, 2016).
8. http://ric-zai-inc.com/ric.php?page=detail&id=COPS-P206 (last accessed Feb. 2, 2016).

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a 1995 Supreme Court case which held that an appellate court does not have jurisdiction to review purely factual disputes on an interlocutory appeal of a denial of qualified immunity. Instead, IMLA argued that *Johnson* has created confusion in the lower courts along with a circuit split, with some appellate courts interpreting it so broadly that they will not even review inferences a district court makes based on other disputed facts. Due to the confusion and circuit split, as well as the frequency with which these issues arise, IMLA urged the Court to grant certiorari.

IMLA also noted that the Supreme Court's own cases have recently implied that *Johnson* should be read narrowly. For example, its opinion in *Scott v. Harris* noted that the video evidence "blatantly contradicted" the plaintiff's version of the facts and that the Court therefore should not adopt that contradicted version of the facts.

The facts of *Blanchard* illustrate the problem that broad interpretations of *Johnson* create. In *Blanchard,* John Brown was suicidal and his mother called 911 after finding that he had cut himself in his bedroom with a knife and would not relinquish the weapon. When officers Blanchard and Such arrived on the scene, his mother conveyed the relevant information to them, including that her son had a knife in his possession and had locked himself in his room in the mobile home. After she spoke to the officers, she went into the living room, where she could no longer see what transpired; however, she could still hear the officers and her son.

One officer went outside to look through the bedroom window to assess the situation and saw Mr. Brown drinking a beer and smoking a cigarette. That officer radioed that information and returned to join Officer Blanchard, who then kicked in the locked bedroom door. Both officers observed Mr. Brown holding a knife; blood was dripping down his arm. Brown closed the door as

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the officers moved towards him. Officer Blanchard kicked in the door again and, according to the officers, ordered Mr. Brown to drop the knife, telling him they would have to shoot him if he did not comply. Instead of dropping the knife, Brown raised it over his head and advanced. When he came within five to six feet of the officers, Officer Blanchard shot, killing Brown.

Brown's mother disputes that the officers told her son to drop the knife. She claims she heard her son say something to the effect of; "Fine, come in and shoot me between the eyes and kill me." It is beyond dispute, however, that she could not *see* the events that transpired and that she therefore did not know whether her son had threatened the officers with the knife by raising it and advancing towards them.

Nonetheless, the district court held that the mother's testimony that the officers did not tell her son to drop the knife discredited their allegations that Mr. Brown had raised the knife and advanced on them as they testified. The court therefore found a dispute of material fact as to whether the officers had been threatened by Brown (despite the uncontradicted testimony on this point as the officers were the only ones able to see the events) and concluded that qualified immunity was inappropriate.

The Seventh Circuit concluded that its review of the denial of qualified immunity on an interlocutory appeal is limited and that it cannot "determine whether the district court erred in finding that a genuine issue of material fact exists." The Circuit Court therefore determined that it must accept the district court's conclusion that there was a genuine dispute of material fact as to whether Brown had raised the knife and advanced on the officers at the time he was shot--even though this was an inference the district court drew based on the dispute of fact regarding whether the officers ordered Mr. Brown to drop the knife. After so concluding, the Seventh Circuit held that the denial of qualified immunity was appropriate because it was clearly established that the use of deadly force against a non-resisting or passively resisting suspect was unjustified.

To learn more about IMLA's amicus activity, including a complete list of all cases in which we filed amicus briefs in 2015 please visit our website at www.imla.org/legal-advocacy or contact Amanda Kellar at akellar@imla.org. ML

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the same way to avoid mistakes in care and treatment of the public. Challenge Staff to explain in detail the rationales for the recommendation. Also, if a mistake is made, remedy it, but be transparent in the process.

6. Get competent advice. I have learned over the years to recognize my limitations. If I am concerned about a particular issue in bidding and purchasing, I always contact the best attorneys that I can find. I outline the situation without inserting my opinion and actively listen to what they say about the issue. I also heavily rely on the opinions of my fellow City Attorneys. If I have not seen a particular issue, chances are that one of them has dealt with it.

7. Provide an opportunity for unsuccessful bidders to be heard. Occasionally, elected officials will want to limit the amount of time that an unsuccessful vendor will have to present their position in open meetings. I always encourage the Mayor to allow vendor representatives as much time as they want (within reason) and to provide as much information as they see fit. Also, in advance of the meeting, I will typically encourage the vendor to provide information they deem necessary and will include it as part of the agenda packet. Limiting the opportunity to be heard only serves to substantiate their claims of a lack of due process and will also likely lead them to the conclusion that the process is "rigged." A well written fact sheet that provides all information regarding successful and unsuccessful bidders encourages Staff to be thorough in their evaluation and also the opportunity for all positions, even those that are unsuccessful, to be set forth.

8. Fully explain and justify recommendations to select the second low bidder. If a governing body deviates from the lowest bid, be prepared to explain the rationale in a professional, non-emotional way. It is critically important in these situations to have all information included in the fact sheet and explain the basis for Staff's recommendation to deviate from the low bidder. Prior performance issues (such as failure to meet demand and delivery deadlines, negative repair histories, and other objective criteria) are extremely helpful in supporting these decisions.

9. Don't fear use of the table. If things are not going well and time is not critically important, I believe that there is always value in tabling an item until additional information can be obtained. Sometimes, the heat of the moment can lead to decisions that are not well thought-out and result in litigation. Giving a vendor or contractor the opportunity to provide additional information to Staff can be incredibly helpful in amicable resolution of an issue, particularly in the area of purchasing. As in most instances, time brings clarity.

10. Justify sole source purchases. Various Departments and Divisions of the City of Broken Arrow love to sole source equipment. They use words like "redundancy," "integration," and "structural integrity" in an attempt to confuse me into agreeing with their proposed purchases. Not to be fooled, I subject them to hours of inquiry and required explanation on the sought-after equipment and the need to narrow the field to one particular provider. Purchases from State contracts and purchasing consortiums are increasingly popular in my jurisdiction. Although not technically sole source purchases, it is important to ensure that procurement from these entities are allowed by both your local ordinances and state statutes.

I recently was vindicated from my role as "Ms. No" by an open records request wherein a citizen demanded an explanation as to the need for several proposed purchases. Fortunately, I had effectively utilized the "belt and suspenders" approach to the point of bringing my Information Systems representative to the precipice of insanity. Information provided to the Inquiring Mind proved to be satisfactory due to the foundation laid in the fact sheet and as supplemented by Staff.

Hopefully, you will find some of this information helpful (or, at a minimum, mildly entertaining). Happy purchasing to all and best of luck staying out of the papers!