

What Do Small Locally Controlled Airports and Sanctuary Cities Have in Common?

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

After a 14-month hiatus, Justice Gorsuch has been confirmed and the Supreme Court is again at full strength. As of this writing, we are still awaiting decisions in a number of important Supreme Court cases affecting local governments in which IMLA filed an amicus brief, including: *County of Los Angeles v. Mendez; Bank of America Corp. v. City of Miami and Packingham v. North Carolina.*

While we await the Court's remaining opinions before the summer recess, IMLA continues to provide our members with amicus support across a broad spectrum. Two cases in which IMLA recently filed amicus briefs could not be more factually distinct, but both raise important issues relating to local government autonomy and preemption:

Quieting a Noisy Local Airport: *Town of East Hampton v. Friends of the East Hampton Airport, Inc.*

The Town of East Hampton owns and operates a small community airport. The airport provides no scheduled commercial services, but serves a range of private chartered helicopters and fixed-wing aircraft. Due to concerns about airport noise, the Town enacted the following ordinances: (1) a mandatory curfew on all aircraft traffic; (2) an "extended" curfew for certain "noisy" aircraft; and (3) a weekly one-round-trip limit on noisy aircraft. Various industry groups sued the Town, claiming that the ordinances were preempted by federal law. The district court entered a preliminary injunction, barring the enforcement of the weekly flight limit, but declined to enjoin the other two laws.

On appeal, the Second Circuit held that federal law preempted the Town's restrictions on access to its airport because the Town had not followed the procedures set forth in Airport Noise and Capacity Act's (ANCA) when imposing those restrictions. The court concluded that the ANCA procedural requirements are mandatory and apply to public airport operators regardless of their federal funding status. The court also determined that the Town's failure to follow those procedures could not be deemed reasonable so as to support the proprietor exception to federal preemption under the Airline Deregulation Act, as the failure to comply with mandatory procedures under federal law is by its nature unreasonable.

In so holding, the Second Circuit claimed that it was not overruling its prior decision in National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1998). In that case, the City's restrictions on its heliport were found to be a lawful exercise of its power under the proprietor exception, despite the fact that it apparently did not comply with ANCA procedures. In this case, the Second Circuit distinguished *National Helicopter*, claiming that the court at the time did not consider "whether and to what extent the ANCA's procedural requirements cabined the reasonable exercise of a municipality's proprietary authority over airport noise, much less did it decide whether local restrictions imposed in the absence of ANCA procedures were federally preempted." (The Town disagrees that the court did not consider the failure to follow the procedural requirements in *National Helicopter*, and thus believes the Second Circuit is overruling its prior decision).

The Town is petitioning the Supreme Court for certiorari and the issue in its petition is whether a municipality must comply with the ANCA's procedural requirements, regardless of federal funding status in order to invoke the proprietor exception to federal preemption.

This case is important to all municipalities that own and operate airports / helipads and wish to enact their own laws to help balance the operation of the airport with the needs of its community, by for example, preventing unreasonable aircraft noise that would disrupt its citizens. Thousands of airports not previously subject to the requirements of ANCA would now be subject to those requirements based on the Second Circuit's decision, despite the fact that these airports / municipalities seek no federal airport grants and levy no passenger facility charges. For example, the curfews and restrictions imposed by New York City for its heliport that was the subject of the 1998 case would be jeopardized by this decision. IMLA's brief points out that it makes little sense to require small local airports to comply with these onerous federal acts where they are not a part of the national airport system. Unlike the larger airports, which need uniform rules regarding noise and aircraft size so that the same airplane can take off in JFK and land in LAX six hours later, these same regulations are inapplicable to small and rural airports that primarily serve local communities.

Even more broadly, IMLA believes it is important to generally support local

autonomy and advocate against broad federal preemption positions. IMLA focused on supporting the Town's autonomy to enact laws addressing its citizens' concerns related its local airport, particularly concerns related to noise. IMLA's brief notes that the "result of 'federalizing' every airstrip in the nation ...will be to discourage local governments from developing and maintaining airport facilities they cannot adequately regulate. Local airports will continue to close. Local communities in turn will be deprived of the tourism and commerce those airports facilitate, as well as the benefits of private aviation."

Rebutting the Attack on Sanctuary Cities: *City and County of San Francisco v. Trump*

Our last issue of *Municipal Lawyer* highlighted the flaws in the President's Executive Order (EO) aimed at Sanctuary Cities, pointing out its tenuous legal footing under the Tenth Amendment and otherwise. We reported at some length on San Francisco's early legal action to enjoin the EO.

We have now filed an amicus brief in support of San Francisco. While it is unusual for IMLA to participate at the district court level, it is not unheard of in a case like this with issues of significance for local governments nationwide. Our brief summed up the quandary facing municipal lawyers: "The Executive Order does not comply with the law and it puts ethical municipal lawyers in an untenable situation in advising their clients: either advise constitutional violations to ensure continued receipt of mission-critical federal monies, or advise violation of the Executive Order and risk termination of that federal funding."

As we noted previously, the EO ("Executive Order 13768: Enhancing Public Safety in the Interior of the United States") threatens to cut federal funding to "Sanctuary Jurisdictions":

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373. (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.

The EO does not define "Sanctuary Jurisdictions." But it purports to implement 8 U.S.C. § 1373, (Section 1373) which provides that local governments may not prohibit or restrict any government entity or official from "sending to, or receiving from, [federal immigration officials] information regarding the citizenship or immigration status . . . of any individual."

San Francisco laws limit when city employees and agencies may assist with enforcing federal immigration law. These laws generally prohibit city employees from using city funds or resources to assist in the enforcement of federal immigration law, unless required by federal or state law. They specifically prohibit local law enforcement officers from cooperating with Immigration and Customs Enforcement (ICE) detainer requests, which they deem to be voluntary, and limit when local law enforcement officers may give ICE advance notice of a person's release from local jail.

San Francisco seeks declaratory and injunctive relief that Section 1373 is unconstitutional both on its face and as applied and that the federal government should be enjoined from enforcing the unconstitutional aspects of the EO.

IMLA's brief notes that numerous courts have concluded that ICE detainer requests must be considered voluntary, or else they would violate the Tenth Amendment. The EO effectively converts ICE detainers from requests to commands via the unlawfully coercive funding condition. Specifically, the "economic dragooning" that so concerned the Supreme Court in *Nat'l Fed. of Independent Business v. Sebelius*, is even more coercive in this case, given that the *Sebelius* funding pertained to 10% of the State's overall funding, whereas here, if all federal funding is at risk, San Francisco alleges that it would lose 13% of its funding.

We argue that requiring (through economic coercion) local governments to comply with ICE detainer requests in the absence of probable cause is tantamount to requiring localities to violate the Fourth Amendment. Such a requirement renders the funding condition in the EO unconstitutional in violation of *South Dakota v. Dole*, 483 U.S. 203 (1987). Local governments' Section 1983 liability for violating individuals' Fourth Amendment rights by honoring insubstantial ICE detainer requests could be staggering. As IMLA sees it, the EO:

presents municipal lawyers with a Hobson's choice. On the one hand, municipal lawyers could advise their clients to comply with the Executive Order by honoring ICE detainer requests. To do so, municipal lawyers would have to counsel their clients to engage in behavior that courts across the country have found to be both unconstitutional and grounds for imposing civil liability. On the other hand, municipal lawyers could advise their clients not to abide by the Executive Order's provisions requiring compliance with ICE detainer requests. To so advise their clients, however, municipal lawyers would be encouraging municipalities to engage in behavior that jeopardizes mission-critical federal funding.

From East Hampton to San Francisco, IMLA appreciates the opportunity to be of service to our members in advocating for the interests of local government.

To learn more about these cases, or IMLA's amicus program, please contact Amanda Kellar at akellar@imla.org.

EDITOR'S NOTE-WINS FOR IMLA MEMBERS!: On April 25, 2017, San Francisco's motion for preliminary injunction against the funding restrictions in the President's Sanctuary Cities Executive Order was granted. And on May 1, 2017, the Supreme Court held, 5-3, that Miami has standing to bring its action under the Fair Housing Act. The Court also found that the Eleventh Circuit had incorrectly applied foreseeability as satisfying the FHA's proximate cause requirement. It reversed and remanded for a lower court analysis of whether Miami's losses were proximately caused by the banks. ML