

Highlighting Local Autonomy

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

The big headline in Supreme Court news is the nomination of Judge Neil Gorsuch to the Court. Judge Gorsuch was appointed to the Tenth Circuit by George W. Bush and many commentators have noted his similarities to the late Justice Scalia, from his views on interpreting the Constitution to his sharp wit. Much has been written about the appointment of Judge Gorsuch, but time will tell what it means for local governments.

Meanwhile, IMLA has had recent success at the Supreme Court, with two cases in which we recently participated as an amicus at the certiorari stage being accepted. The first case is *District of Columbia v. Wesby,* which was featured in the July–August 2016 issue of *Municipal Lawyer* and involves the question of whether a police officer assessing probable cause is entitled to credit one set of conflicting statements over another and if the officer cannot, whether the law was clearly established on this point for the purposes of qualified immunity. The second case is *Town of Chester v. Laroe Estates, Inc.*, which asks whether a party seeking to intervene as a matter of right needs independent Article III standing to do so. Both of these cases involve important issues for municipalities and IMLA is pleased to have brought them to the Court's attention. We will also be filing amicus briefs in these cases at the merits stage.

IMLA's amicus program continues to stay busy at all levels, not just at the High Court, as we support members with issues ranging from a challenge to a local beverage tax to a challenge of a city's benefit plan for same-sex couples. Although each of these cases, discussed below, involves state court litigation, we believe they are important not just to IMLA members within the affected jurisdictions, but more broadly to IMLA's goal of promoting local autonomy wherever possible.

Williams v. City of Philadelphia

Williams involves questions of preemption and arises out of a suit seeking to invalidate the Philadelphia Beverage Tax (PBT), which was passed in June 2016. The PBT would impose a 1.5 cent tax per fluid ounce on sugar sweetened beverages (SSBs) transferred by distributors to dealers. The PBT states that the tax is imposed only when the "supply, acquisition, delivery or transport is for the purpose of the dealer's holding out for retail sale within the City the [SSB]..." Generally, distributors are responsible for the payment of the tax to the City, but if the distributor does not pay, then the dealer becomes responsible for payment. Consumers are not responsible for the tax (though distributors like Coca Cola may decide to increase prices as a result of the tax). The PBT's definition of SSB specifically excludes things like baby formula, medical food, milk, and products which contain more than 50% fruit and/or vegetables as well as products that a purchaser can add sugar to at the point of sale.

Plaintiffs--retailers and beverage and food associations--filed suit in state court, seeking injunctive and declaratory relief to invalidate the PBT, claiming the Philadelphia taxation initiative is preempted by both state and federal law.

In Pennsylvania, the Sterling Act (Act) empowers the City of Philadelphia to levy and assess certain taxes for general revenue purposes, subject to various restrictions. The district court held that while the purpose of the Act is to prohibit double-taxation, Philadelphia's PBT was not preempted by the Act simply because a business is also taxed on certain aspects of its operations pursuant to Pennsylvania's Sales and Use Tax. Instead, the court noted, the Act only prohibits a local government from imposing a tax on the same aspects of a business that is also being taxed by the Commonwealth. The district court reasoned that the respective taxes apply to "two different transactions, have two different measures and are paid by different taxpayers," even though the Sales and Use tax also applies to soft drinks. Notably, the PBT only applies when SSBs are distributed to the dealer, regardless of whether the dealer sells the product to the consumer, whereas the Sales and Use tax is imposed at the retail level and paid by the consumer.

The district court similarly held that the law was not preempted by the federal government's Supplemental Nutrition Assistance Program, administered by the Department of Agriculture (SNAP) because again, it does not impose a tax on the consumer, but rather on the distributor.

The issue on appeal is whether the PBT is preempted by Pennsylvania's Sales and Use tax and/or federal government's SNAP program. This case is significant to IMLA members for a number of independent reasons. First, IMLA believes we should fight against unwarranted preemption of local laws, thereby supporting local government autonomy and in this case, a municipality's ability to impose tax schemes. Obviously, a local government's ability to tax its residents as well as businesses that operate within its jurisdiction has significant consequences on the municipality's ability to raise funds, to administer and pay for necessary services, and so on.

Second, more local governments will likely be looking at taxes like the one at issue here to effect important local policy; whether to curb the nation's obesity epidemic, to reduce litter, or to move away from use of plastic bags. There is little doubt that Americans' high consumption of sugar increases obesity, which has significant negative health effects including diabetes, increased risk of heart attacks, and the like. These negative consequences directly impact municipalities as they are costly to combat and risk the lives of their residents. Today's local governments are the "laboratories for democracy" envisioned by Justice Brandeis, and their powers must be solidi-

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fied rather than eroded if we are to maintain the integrity of our federalism as envisioned in the Constitution.

Pidgeon v. Mayor Turner and City of Houston

In this case, the City of Houston (City) offered benefits to same-sex spouses of City employees legally married in other jurisdictions prior to the Supreme Court's decision in *Obergefell v. Hodges* (which held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a such a marriage when lawfully licensed and performed out-of-state). Private citizens brought suit as taxpayers against the City seeking to prevent it from providing these benefits.

A Texas district court entered an injunction against the City and ordered the City to discontinue the benefits. The City appealed, which stayed the order and while it was on appeal, the Supreme Court decided *Obergefell.* The City then argued the case was moot in light of the Supreme Court's decision and the appellate court agreed, reversing the district court's original decision and remanding it for proceedings consistent with *Obergefell*.

The case went up to the Texas Supreme Court and the City argued a number of procedural infirmities. Ultimately the Texas Supreme Court denied the petition for review, on jurisdictional grounds, which would have doomed the taxpayers' suit.

One of the Justices dissented from the denial, stating: "Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review... This case, however, involves employment benefits, which the City obviously has no constitutional duty to offer to its employees, let alone their spouses. Though the laws in *Obergefell* denying access to marriage were subject to strict scrutiny, the laws in this case allocating benefits among married couples are not."

The Texas Supreme Court's denial for review would have sent the case back to the trial court and ultimately would have resulted in its dismissal. However, the appellants filed a petition for rehearing and a number of amici came in supporting them, including a number of state legislators. The amici argue that *Obergefell* only held that same-sex couples have a constitutional right to marry, and that it did not invalidate laws that provide more benefits to heterosexual couples. They also argue that *Obergefell* should not apply retroactively. The Texas Supreme Court (which is comprised of elected Justices) thereafter granted the petition for rehearing.

The issues before the Texas Supreme Court are:

1. Should *Obergefell* be extended narrowly as the appellants claim i.e., does *Obergefell* extend beyond the state's requirement to simply issue marriage licenses and thus require employers to offer the same benefits to same-sex couples as are offered to heterosexual couples?
2. Does the Supreme Court's decision in *Obergefell* retroactively apply to benefits the City of Houston provided to its employees for same-sex spouses married outside of the state?

While the *Obergefell* holding specifically related to marriage licensing, the City believes the decision is clear that marriage is more than a piece of paper and it relates to the attendant benefits associated with marriage as well, including those at issue in this case. Additionally, the City argues that the Court has long-standing precedent about the retroactive effect of its constitutional holdings. (The other side claims these holdings do not apply to rights like the right to marriage because those rights are based on the Court's interpretation of a "living" Constitution).

IMLA has taken the position that discriminatory laws impair the ability of municipalities to treat their residents with dignity and respect. These laws also detract from municipalities' economic growth and ability to attract talented employees, including those who identify as LGBTQ. IMLA believes *Obergefell* settled this issue and lawsuits like the one in this case are costly distractions and will ultimately fail.

More importantly, IMLA believes this case is not just about the interpretation of *Obergefell,* but rather it has significant implications for local government autonomy. Municipalities should be empowered to offer their employees whatever benefits they wish, absent some specific mandate by the State. Thus, it seems that the issue is being turned on its head in this case. This case shouldn't be about whether a city was *required* to provide benefits to same-sex couples before *Obergefell*. Rather, this case should be about whether a municipality that *voluntarily* provides these benefits to its employees can be *prevented* from doing so.

Additionally, it seems likely that the Constitution requires the City to provide the benefits to same-sex couples married out of state because it provides those benefits to other married couples. Where a local government recognizes the lawful decisions of other jurisdictions and then provides some benefit as a result, IMLA does not believe the state (or in this case the taxpayers) are in a position to claw those benefits back.

For more information about these cases or IMLA's legal advocacy program, please contact Amanda Kellar at akellar@imla.org. ML

