

IMLA's *Amicus* Activities

By Erich R. Eiselt, Assistant General Counsel and Editor

Not all *Municipal Lawyer* readers may know of IMLA's legal advocacy activities, which is another valuable benefit we provide members. IMLA's nine-member Legal Advocacy Committee, currently headed by Steve Chinn, evaluates numerous potential Supreme Court cases each year. The Committee takes into account views of the IMLA Board of Directors to determine whether IMLA should take a position as *amicus* on behalf of its members. If the decision is made to proceed, IMLA will locate a private practitioner, scholar or municipal office to write the *amicus* brief, or will sign on to support an *amicus* brief being written by an organization with interests paralleling IMLA's, such as the State and Local Legal Counsel (SLLC), the National Association of Counties (NACo), the United States Conference of Mayors (USCM) and many others. In certain cases, IMLA itself writes the brief.

Our goal in all cases is to promote the position most beneficial to our members, whether the issue is preemption, takings, taxation, land use, maintaining public safety –or many others.

These are some of the cases for which IMLA has signed on as an *amicus*:

***Maryland State Comptroller v. Wynne*, No. 13-485** (petition-stage *amicus* brief filed November 18, 2013). In this case, IMLA wrote the petition-stage brief supporting the position of the Maryland Comptroller against a resident taxpayer's challenge that the dormant Commerce Clause limits the state from taxing all the income of that resident. The Maryland Court of Appeals held in favor of the taxpayer, and the Comptroller is seeking review by the Supreme Court.

Our brief was joined by USCM, NACo, the International City/County Management Association and the Maryland Association of Counties. On January 13, 2014, the petition received a "CVSG" order from the Supreme Court, meaning that the Court is "Calling for the View of the Solicitor General" as it determines whether or not to grant certiorari. IMLA is optimistic that the CVSG order, which is issued by the Court very rarely (typically fewer than fifteen times each year) will generate interest from the Solicitor General's office and a grant of certiorari.

We anticipate a decision by the Solicitor General before May 2014 and a certiorari determination from the Court by June 2014.

***McCullen v. Coakley*, No. 12-1168** (merits-stage *amicus* brief filed November 22, 2013). This case considers the permissibility of buffer zones around abortion clinics. Massachusetts law makes it a crime to "enter or remain on a public way or sidewalk" within thirty-five feet of the entrance, exit, or driveway of a reproductive health care facility. The law exempts employees or agents of the clinic while they are acting within the scope of their employment.

Petitioners challenged the law under the First and Fourteenth Amendments, arguing that it restricts the speech of "only those who wish to use public areas near abortion clinics to speak about abortion from a different point of view." Petitioners also argued that to the extent that the Court's 2000 decision in *Hill v. Colorado* controls the outcome of this case, that decision should be overruled. (In *Hill*, the Court had ruled that the First Amendment right to free speech was not violated by a Colorado law limiting protest, education, distributing literature or counseling within a "moving buffer" of eight feet from a person entering a health-care facility.)

Oral argument was heard on January 15, 2014. With the exception of Justice Ginsburg, the Court seemed wary of the Massachusetts buffer zone—both as to its dimensions (Justice Kagan thought that the thirty-five foot zone was excessive, being almost as big as the courtroom) and its effect (Justice Kennedy wondered why conversing with a potential clinic user was not protected speech).

A decision is expected by June 2014. The Court will decide (1) whether the First Circuit erred in upholding Massachusetts's selective exclusion law – which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility" – under the First and Fourteenth Amendments, on its face and as applied to petitioners; and (2) whether, if *Hill v. Colorado* permits enforcement of the Massachusetts law, *Hill* should be limited or overruled.

The *amicus* brief was written by Mary Jean Dolan, formerly Professor of Law at John Marshall Law School.

***Integrity Staffing Solutions*, Inc. v. *Busk*, No. 13-433** (petition-stage *amicus* brief filed November 7, 2013). Integrity provides temporary warehouse staffing to clients such as Amazon.com. In 2010, two plaintiffs filed a putative class action alleging that pursuant to the FLSA, they and hundreds of other Integrity employees were entitled to compensation for time spent undergoing security screenings at warehouses in which they filled orders for the online retailer.

Integrity moved to dismiss arguing that the time spent clearing security checks was not compensable under the FLSA, as the security screenings were not "necessary and integral" to the

employees' jobs as warehouse workers. Integrity's argument in favor of dismissal was consistent with decisions of the Second Circuit and the Eleventh Circuit.

The district court agreed with the holdings of those courts and held that even if the security checks were necessary to the employer's goal of minimizing employee theft, plaintiffs did not state a claim upon which relief could be granted because the security screenings were not "necessary and integral" to the employees' jobs of order fulfillment. Plaintiffs appealed, and the Ninth Circuit reversed, expanding the scope of compensable activities under the FLSA.

IMLA urges the Court to consider the fiscal impact on municipalities if the Ninth Circuit's expansive view of "integral and indispensable" activities is allowed to stand.

The *amicus* brief was written by James Ho, Partner at Gibson, Dunn & Crutcher's Dallas, Texas office.

***Sandlands v. County of Horry*, No. 13-1134** (Fourth Circuit, argued October 31, 2013). This was a solid waste flow control case in the vein of *United Haulers Assn. v. Oneida-Herkimer Solid Waste Mgm't Auth.*, 550 U.S. 330 (2007). *In United Haulers*, the Supreme Court held that flow control ordinances which benefit a public entity and do not favor local private interests over other private interests do not offend the Commerce Clause.

In 2009, Horry County, South Carolina passed an ordinance requiring all municipal solid waste and construction and demolition debris to be processed within the County and disposed of in a landfill owned and operated by a public corporation created by the County. Private haulers could collect waste, but it had to be processed inside the County with recyclable materials removed before the "County-only" waste was disposed of in the County landfill. Private haulers wishing to compete were required to set up a transfer station where the recyclables could be separated inside the County.

Plaintiffs operated a landfill just outside Horry County. They objected to the requirement that waste be processed within County and claimed that they had anticipated the Horry County solid waste stream when their landfill was permitted by the State. They challenged the ordinance on a number of grounds, both State and Federal, including violations of the dormant commerce clause, equal protection, unlawful delegation of police powers, contracts clause violations, inverse condemnation, substantive due process, denial of vested rights, preemption, interference with contractual relations and others. The district court certified the question of whether the State's Solid Waste Management Act preempted the County's ordinance, including the power to designate where the waste was to be processed and disposed of. The district court also held in favor of the County on the federal issues. Plaintiffs appealed

On December 3, 2013 the Fourth Circuit upheld the lower court decision finding that Horry County's flow control ordinance did not violate the Commerce Clause.

The *amicus* brief was authored by Scott DuBoff, partner at Garvey, Schubert Barer's Washington DC office.

***Township of Mount Holly v. Mt. Holly Garden Citizens in Action*, No. 11-1507** Merits-stage *amicus* brief (filed September 13, 2013). The issue in this case was whether disparate impact claims are cognizable under the Fair Housing Act (FHA). If the Court were to reach such a conclusion, local municipalities would be subject to suits for the unintended adverse impacts of their housing and redevelopment policies on minority populations.

Mount Holly Gardens, a section of the Township of Mount Holly in Central New Jersey, consists of about 300 brick units originally constructed in the 1950's as military housing. In recent years the neighborhood had fallen into decline, experiencing problems with absentee landlordism and abandoned units. The area also became plagued with drug dealing and criminal activity. In 2002 the township declared the neighborhood blighted and in need of redevelopment.

The township's redevelopment plan called for the razing of 329 houses to make way for 228 apartments, 292 townhouses, and 54,000 square feet of commercial space. The plan provided for about 10 percent of the neighborhood to be allocated to affordable housing, consistent with the state Council on Affordable Housing Standards. Residents feared that they would be forced out of their neighborhoods because the plans failed to provide for a sufficient rehabilitated units and new affordable housing. In 2003, residents filed suit under the FHA, alleging that the redevelopment had a disparate impact on minority citizens who would be forced to vacate.

In September 2011, the Third Circuit ruled that the redevelopment plan may have been discriminatory and in violation of the FHA, even if that was not the township's intent. The parties ultimately settled in November 2013.

The IMLA *amicus* brief was written by Kevin Decker, partner at Briggs and Morgan in Minneapolis, Minnesota.

***City of Buffalo v. Margerum*, No. CA 12-01540** (New York Court of Appeals). This case is an important test for municipalities because it represents the first decision that has directly applied "strong basis in evidence" standard for disparate impacts, established in *Ricci v. Destefano*, to a municipal employer's voluntary efforts to comply with Title VII.

Many years ago, Buffalo was sued by the Department of Justice regarding minority hiring in its police and fire departments. Buffalo lost, and an injunction was issued prohibiting the City from discriminating against minorities, including females. The order also required the City to set certain diversity goals for each minority and for females to balance its public safety workforce.

Around 2000, African American firefighters filed a class action suit asserting that tests the City used unfairly limited their promotion in a discriminatory manner. The City hired a consultant who concluded that the City's tests were not race-neutral. Faced with impeding litigation and fearful that it would be subject to disparate impact liability, the City took certain race-conscious actions to correct their previously misguided personnel procedures. One such action was to disregard the results of promotional examinations by terminating the promotion list. In doing so, the City relied on *Ricci v. Destefano* (a 2009 Supreme Court case in which IMLA had participated as amicus.) *Ricci* permits an employer to disregard the results of a personnel selection procedure that favors one

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ing parties their reasonable attorney's fees in various civil rights actions. City Commissioners were made aware from the beginning that a ruling against the City could result in the City being forced to pay the Plaintiffs' legal fees. After more than two years of intense litigation, it can only be assumed that those fees would be very significant.

Conclusion

When public safety regulations tangle with First Amendment rights, those imposing regulations should strive to find the middle ground between accommodating those who wish to exercise their rights and the need to provide for the safety of the public at large. In enacting and enforcing regulations that might affect the exercise of free speech and expression and/or freedom of the press, governmental entities should:

- Know the traditional public *fora* (i.e., streets, sidewalks, parks) within the governmental entity's jurisdiction.
- Make sure the regulations that apply to those *fora* can be described as:

  -Content-neutral neutral-Are the regulations justified without reference to the content of the regulated speech? (If content-based, the regulations must be capable of passing a "strict scrutiny" test by the courts.)
  -Narrowly tailored to serve a significant governmental interest inte the regulations promote a significant governmental interest that would be achieved less effectively absent the regulation?
  -Leaving open ample alternative means of communication.

Despite its best efforts, a local governmental entity may become a defendant in a First Amendment lawsuit. If so, it is crucial that stakeholders know what they are in for. Governing body members and administrators should be made aware of the implications of each of the considerations listed in the above section as they might apply, along with any other considerations that might need to be addressed. A "gut check" may be needed in order to determine how secure the governing body and administrators feel about their position and the extent to which they wish to defend that position. Nonetheless, the overall needs of the community and the government's critical role in providing for the safety and well-being of citizens should not be abandoned.

1. 491 U.S. 781, 791 (1989).
2. 468 U.S. 288, 293 (1984).
3. The Contributor v. City of Brentwood, ~ F.3d ~, 20 WL 4081905 (6th Cir. 20).
4. Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008).
5. The Contributor v. City of Brentwood, 2012 WL 5331261 (M.D. Tenn. 2012).
6. Ordinance 2011-09 deals with more than the sale of newspapers. In addition to addressing the sale and distribution of merchandise and materials in the right-of-way, the ordinance prohibits solicitation of donations from vehicle occupants. The ordinance deals directly with persons who might otherwise stand at intersections and elsewhere within the street to ask for donations. It also prohibits the use of public rights-of-way to alert vehicle occupants to any commercial activity by the use of signs or other devices. And it specifically addresses advertising gimmicks such as "sign spinners" on sidewalks and elsewhere in the right-of-way who distract drivers from staying focused on safe driving.
7. Although beyond the scope of this article, the complaint also alleged denial of plaintiffs' rights to freedom of speech, expression and the press under Article I, Section 19 of the Tennessee Constitution.
8. Ater v. Armstrong, 961 F.2d 1224, 1227 (6th Cir. 1992).
9. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).
10. *Id.* at 798.
11. *Phelps-Roper*, 539 F.3d at 372 (6th Cir. 2008) (citing Heffron v. Int'l Soc. for Krishna Consciousness, Inc. 452 U.S. 640, 647 (1981)).
12. Docket # 12-6598, 6th Cir.
13. Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494 (5th Cir. 1989).
14 Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 668 F. Supp. 527, 530 (M.D. La. 1987) aff'd, 876 F.2d 494 (5th Cir. 1989).
15. ACORN v. St. Louis County, 930 F.2d 591, 596 (8th Cir. 1991).
16. 657 F.3d 936 (9th Cir. 2011).
17. *Id.* at 949.
18. Gail Kerr, *Brentwood cares more about its own looks than for the homeless*, THE TENNESSEAN, July 3, 2011.
19. Jeff Woods, *Brentwood tries to recast image amid 'Contributor' legal challenge*, THE CITY PAPER, July 17, 2011. ML

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racial group over another, so long as there is a "strong basis in evidence" to conclude that a disparate impact exists.

In turn, a group of white firefighters sued, asserting that the termination of the test created an equal protection violation. The lower court and intermediate appellate court agreed. The City appealed.

IMLA supports the City's position. The *amicus* brief was written by Prathima Reddy, in private practice in Buffalo, New York.

***Wood v. Moss*, No. 13-155** (merits-stage *amicus* brief filed January 17, 2014). Here, the Supreme Court will decide whether Secret Service agents engaged in unconstitutional viewpoint discrimination when they moved anti-Bush protesters about one block further from the President than pro-Bush demonstrators and whether the agents should be granted qualified immunity.

IMLA joined the SLLC's *amicus* brief, which encourages the Court to tour downtown Jacksonville, Oregon using Google Maps Street View. The brief advises that Justices will discover a parking lot adjacent to the Jacksonville Inn's outdoor patio where President Bush was dining--which the anti-Bush protesters would have had direct access to had they not been moved a block away. Pro-Bush demonstrators had no direct access to the Inn where they were gathered because the side of the Inn they were facing was totally blocked by another building. The SLLC's brief also argues that when the safety of the President is a stake, police may consider the content of speech. Finally, the brief argues that the lower court evaluated the qualified immunity question in this case without consideration of the facts.

The *amicus* brief was written by Bennett Cohen of the Polsinelli PC firm in Denver, Colorado. The case will be argued March 26, 2014. ML