

Supreme Court Term Preview: Local Government at the High Court

By Victor Kessler

After the Justices ruled on same-sex marriage, the Voting Rights Act, and affirmative action at the end of June, attorneys and court-watchers are anxiously awaiting their return in October. The highest court in the land has already agreed to hear cases affecting local government on everything from controversial topics such as legislative prayer and demonstrations near abortion clinics to more esoteric subjects like the proper vehicle for age discrimination lawsuits and federal court abstention. Here are a few cases to watch for next term that may have a big impact on local government.

Town of Greece v. Galloway, 681 F.3d 20 (2d Cir. 2012) *cert granted* (U.S. May 17, 2013) (No. 12-696) might redefine the Court's approach to legislative prayer practices. Under the 1983 precedent *Marsh v. Chambers* 463 U.S. 783 (1983) the Court held that a state legislature could hire a chaplain to deliver a prayer at the beginning of its sessions as long as the practice was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." The Town of Greece's official policy allows any person of any or no denomination to deliver an invocation at the beginning of town board meetings, and the Town does not approve or even examine the prayer in advance. In practice, all but four invocations (two Jewish, one Baha'i, and one Wiccan) have been led by Christians. The Court will review a "totality of the circumstances" test employed by the Second Circuit to declare the Town's practice an unconstitutional violation of the Establishment Clause and revisit its holding in *Marsh* for the first time in three decades. The case could impact many local bodies which begin their sessions with a prayer.

In *Township of Mount Holly v. Mount Holly Citizens in Action, Inc.,* 658 F.3d 375 (3d Cir. 2011) *cert granted* U.S. Jun. 17, 2013 (No. 11-1507), the Court will decide whether the Fair Housing Act (FHA) allows plaintiffs to bring disparate impact claims in addition to disparate treatment claims. The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." If a person is treated differently on account of a protected status, he or she may sue under the FHA. The question presented by this case is whether a policy or action (here, a plan to redevelop a low-income minority neighborhood) that disproportionately affects a protected class of citizens without intentionally discriminating on the basis of race or other factors can also give rise to an FHA claim. Because redevelopment plans frequently, though unintentionally, can have disparate impacts on minorities, *Mount Holly* could expose cities and other local governments to increased liability.

In *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013) *cert granted* U.S. Jun 24, 2013 (No. 12-1168) the Court will examine the constitutionality of a Massachusetts law that creates a 35-foot "buffer zone" around reproductive healthcare facilities into which demonstrators are not allowed to enter. A 2008 case, *Hill v. Colorado,* 503 U.S. 703 (2008), upheld a similar law against a First Amendment challenge because it (1) addressed a legitimate state concern for the safety and privacy of individuals using the facilities, (2) was "content-neutral" in that it applied to all demonstrators equally regardless of viewpoint, and (3) regulated the "time, place, and manner" of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. A broad ruling by the Justices could have sweeping consequences beyond this particular context, as local governments are continually challenged to strike a balance between free speech rights and the duty to protect their citizens from harassment at clinics, funerals, political events, and other locations.

Harvey Levin claims he was fired for being too old. In *Madigan v. Levin*, 692 F.3d 607 (7th Cir. 2012) *cert. granted* U.S. Mar. 18, 2013 (No. 12-872) the Supreme Court will decide whether he and others like him must follow the procedures of the federal Age Discrimination in Employment Act (ADEA) before initiating a lawsuit, or whether terminated employees may go to court directly under the Fourteenth Amendment and 42 U.S.C. § 1983. The ADEA contains a comprehensive scheme that requires potential plaintiffs to file a complaint with the Equal Employment Opportunity Commission, which will attempt to resolve the issue informally before the former employee can sue. A Section 1983 claim would circumvent this process and end up costing employers, including local governments, substantially more time and money.

Sprint Communications Company v. Jacobs 690 F.3d 864 (8th Cir. 2012) *cert. granted* U.S. Apr. 15, 2013 (No. 12-815) arose out of a telecom dispute in Iowa. Sprint refused to pay another company's intrastate access charge for a service and asked the Iowa Utility Board (IUB) for confirmation that it was under no obligation to do so. The IUB ordered Sprint to pay, and Sprint challenged the IUB's decision in federal and state courts simultaneously. Under the *Younger* abstention doctrine, the Eighth Circuit ruled that the district court should not hear the case, if at all, until the state court review of the IUB decision was complete. The Supreme Court took the case to decide whether it mattered for the purposes of abstention that Sprint initially asked the IUB for

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Growing Threat to Attorney and Client Confidentiality From Online Tracking, 16 Va. J. of Law & Tech. 1 (2011), http://www.vjolt.net/vol16/issue1/v16i1_1-Klinefelter.pdf (last visited June 28, 2013).
14. As to domestic phone calls, NSA claims it only collects metadata, which in this context apparently means call log data rather than the substance of communications. *See* Rutrell Yasin, NSA's intell gathering puts the spotlight on metadata ~ GCN, http://gcn.com/articles/2013/06/26/nsa-intell-gathering-spotlight-metadata.aspx?s=gcntech_270613&m=1 (last accessed June 28, 2013).
15. *See*, *e.g.*, Peter Bright and Dan Goodin, Encrypted e-mail: How much annoyance will you tolerate to keep the NSA away? | Ars Technica, http://arstechnica.com/security/2013/06/encrypted-e-mail-how-much-annoyance-will-you-tolerate-to-keep-the-nsa-away/?utm_source=Ars+Technica+Newsletter&utm_campaign=970d84696c-September_02_2011_Newsletter&utm_medium=email&utm_term=0_0adf3ee3d9-970d84696c-61721097 (last accessed June 21, 2013); Joan Walsh, Encrypt your emails, evade the NSA - Salon.com, http://www.salon.com/2013/06/11/evade_the_nsa_with_these_safe_surfing_tips_partner/ (last visited June 28, 2013);
16. *See* The Motherboard Guide to Avoiding the NSA | Motherboard, http://motherboard.vice.com/blog/the-motherboard-guide-to-avoiding-the-nsa (last accessed June 28, 2013).
17. *See* Dan Goodin, Use of Tor and e-mail crypto could increase chances that NSA keeps your data | Ars Technica, http://arstechnica.com/tech-policy/2013/06/use-of-tor-and-e-mail-crypto-could-increase-chances-that-nsa-keeps-your-data/ (last accessed June 29, 2013).
18. The known "presence" of strangers traditionally waives the privilege. *See* Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994). This raises issues beyond the scope of this article, but the argument for waiver is that the known practice by NSA to collect data from cloud servers would waive the privilege even if no attorney-client communications were intercepted either because the client took insufficient precautions to protect confidentiality or because the carelessness evidenced lack of intent to keep the communication privileged. *See* T. Noble Foster & Christopher R. Greene, Legal Issues of Online Social Networks and the Workplace, 18 J.L. Bus. & Eth. 131, 135 (2012) (posting on Internet waives privilege because no objective expectation of privacy, even using password protection).
19. *See* Jacob M. Small, Storing Documents in the Cloud: Toward an Evidentiary Privilege Protecting Papers and Effects Stored on the Internet, 23 Geo. Mason U. Civ. Rts. L.J. 255 (2013). I do not think this would ever happen, which of course means that the chances are quite good! ML

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approval—a remedial proceeding— or if *Younger* abstention only applies where the state brings a party before the court or administrative board in a coercive proceeding. Most remedial proceedings happen on the local level and involve zoning variances, the denial of gun permits, and the like. The question is whether a federal court should be able to review this type of decision immediately or whether it should abstain until the state proceedings have ended. The SLLC will file an *amicus* brief in this case.

Next term is already shaping up to be an exciting one for local governments, and the Court is likely to grant thirty or so more petitions before February. Although the cases set for argument so far might lack the glamour and media hype of this summer's rulings on same-sex marriage, voting rights, and affirmative action, the issues before the Court deal with some of the essential mechanisms of local governance across the country. Whether the Justices will rule in favor of local governments remains to be seen.

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