


# A Look at Pending Petitions, Cases

*by Sophia M. Stadnyk, Senior Associate Counsel*

The U.S. Supreme Court's October Term begins on Monday, October 3, 2011. The Court has a number of petitions before it that are of interest to local governments.

*City of Los Angeles v. Alameda Books*, 631 F. 3d 1031 (9th Cir. 2011), *petition for cert. filed* (U.S. Aug. 23, 2011) (No. 11-245), looks at adult business regulation. In the 1980s, the City of Los Angeles passed a zoning ordinance prohibiting more than one adult entertainment business at the same location. The plaintiffs, who sold adult print media and operated an "adult arcade" at one site, sued, claiming that enforcing the ordinance would violate their First Amendment rights. The district court granted summary judgment in favor of the plaintiffs, finding that, when the City amended the ordinance in 1983, it had no basis for believing that the operation of combined (as opposed to neighboring) adult businesses led to harmful secondary effects; therefore, the ordinance failed to satisfy strict scrutiny. The City appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed on alternative grounds, which decision the U.S. Supreme Court reversed and remanded: *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). The Supreme Court's opinion required courts to employ a new burden-shifting framework when applying the traditional analysis pursuant to *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and provided that a municipality's justification must not be that its regulation would reduce secondary effects simply by reducing speech proportionately. In turn, the Ninth Circuit remanded the matter back to the district court.

The district court granted summary judgment for the plaintiffs, finding that the ordinance could not withstand intermediate scrutiny and violated the First Amendment. It made two important threshold rulings in doing so: to strike the declaration of a City expert witness, Vanita Spaulding, a business valuation professional, to the effect that it would be possible to split a previously joined adult arcade business and adult bookstore business while preserving the economic viability of the arcade. The second was to reject the City's objections to declarations by the plaintiffs' two witnesses, Andrus and Hinckley. Andrus, the vice-president of the corporation which now owned the plaintiff businesses, opined that a stand-alone adult arcade would not be profitable. Hinckley was the president of Video Simplex, a company that built and installed adult arcade systems, and which had installed the systems in both plaintiff businesses. He testified that the consensus of those in the adult entertainment industry was that a stand-alone adult arcade would not attract a significant number of customers and would be perceived as "seedy." Neither Andrus nor Hinckley purported to offer any empirical support for the shared position that a stand-alone adult arcade would not be viable. The district court ruled that the plaintiffs' evidence cast the requisite doubt on the City motive and rationale in enacting the ordinance, because the Andrus and Hinckley declarations suggested that the City's intent in passing the ordinances was to reduce secondary effects by closing arcades, "impermissibly 'reducing speech in the same proportion.'"

The Ninth Circuit reversed, finding the district court erred by granting summary judgment on the issue of whether the plaintiffs had presented actual and convincing evidence casting doubt on the City's rationale for its ordinance. In this case, the petition for certiorari asks whether the burden-shifting framework established in the earlier *Alameda Books* decision requires upholding the ordinance when the plaintiffs challenging the regulation could not, at the summary judgment stage of proceedings, produce "actual and convincing" evidence casting "direct doubt" on the City's rationale for the regulation.

In *Faulkner v. U.S.*, 636 F. 3d 1009 (8th Cir. 2011), *petition for cert. filed* (U.S. Aug. 18, 2011) (No. 11-235), the issue is whether the discovery, by the police, of an outstanding arrest warrant during a concededly unconstitutional seizure of a suspect purged the taint of the illegal seizure, permitting the government to introduce, at trial, evidence obtained as a direct consequence of an arrest on the outstanding warrant. Faulkner ("also known as Hot Rod," as noted in the style of cause) was wanted on an outstanding federal arrest warrant. He was stopped by police for running a red light. Video from the police cruiser later confirmed that Faulker had not run the light. Officers discovered the existence of the outstanding warrant and conducted a search incident to arrest that revealed drugs hidden in the car. While being read his Miranda rights, Faulkner made incriminating statements as to ownership of the drugs. He sought to suppress the evidence on the basis that it was the "fruit of the poisonous tree," stemming, as it did, from the illegal stop of his car. Both the district court and the Eighth Circuit held that the intervening circumstance, the arrest warrant, purged the 'taint' of the original illegal stop.

*Armour v. City of Indianapolis*, 946 N.E.2d 553 (Ind. 2011), *petition for cert. filed* (U.S. Aug. 08, 2011) (No. 11-161), involves an equal protection claim against a municipality arising from tax assessments. The City of Indianapolis had used the Barrett Law method of financing sewer improvements, which authorized municipalities to provide or

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## Zoning Decision Immunity

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*Joe's*").
2. *Id.* at *3.
3. 438 U.S. 478 (1978).
4. *Id.* at 481.
5. *Id.* at 485.
6. *Id.* at 508.
7. *Id.* at 512-13.
8. *Id.* at 512-13.
9. *Id.* at 517.
10. 438 F.3d 320 (3rd Cir. 2006).
11. *Id.* at 325-26.
12. *Id.* at 326-27.
13. *Id.* at 325-326, quoting *Bass v. Attardi*, 868 F.2d 45, 50 (3rd Cir. 1989).
14. 229 F. Supp. 2d 1056, 1065-67 (D. Haw. 2002).
15. 326 F. Supp. 2d 1128, 1135-36 (E.D. Cal. 2003).
16. *Id.* at 1135.
17. *Id.* at 1136.
18. *See, e.g.*, Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F. Supp. 2d 633 (E.D. Pa. 2003); Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 656 (W.D.N.C. 2002); Ryan v. Lower Merion Township, 205 F. Supp. 2d 434 (E.D. Pa. 2002); Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).
19. *Hyatt*, 225 F. Supp. 2d at 656, quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (internal citations omitted).
20. *Buckles*, 191 F.3d at 1136.
21. *See, e.g.* Bettencourt v. Bd. of Registration in Medicine, 721 F. Supp. 382, 385 (D. Mass. 1989).
22. Killinger v. Johnson, 389 F.3d 765, 770-71 (7th Cir. 2004); Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983).
23. *Id.*
24. *Chicago Joe's*, 2009 WL 3824723 (N.D. Ill. Nov. 12, 2009).
25. *Id.* at *1.
26. *Id.* at *2, citing 65 ILCS 5/11-13-25 (2006).
27. *Id.*
28. *Id.*
29. *Id.* at *2-*3.
30. *Id.*
31. *Id.* at *3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392 (11th Cir. 1993) and *Biblia Abierta v. Banks*, 129 F.3d 899, 904 (7th Cir. 1997), to support the denial of absolute immunity to "local legislators").
38. No. 10 C 2168, 2011 WL 1225459, 2011 U.S. Dist. LEXIS 33481 (N.D. Ill. Mar. 28, 2011).
39. *Id.* at *8.
40. *Id.* at *9-*11.
41. *Id.* at *11.
42. *Id.* ML

## Federal

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been referred to the Committee on Finance, and H.R. 2701 has been referred to the Subcommittee on Courts, Commercial and Administrative Law. The text and status updates for both bills are available online from the Library of Congress website, http://thomas.loc.gov.

In California, Governor Brown signed a bill that gave Amazon, reportedly the world's largest online retailer, a one-year moratorium on the obligation to collect the State's 7.25% sales tax on internet transactions imposed by a June law, in return for the company discontinuing its efforts for a referendum to repeal the sales tax measure. According to the *Washington Post*, Amazon is due to begin collecting the tax in September 2012 if no national online sales tax is in place by then. ML

## Supreme Court

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require public improvements and fund those improvements by levying special assessments against the properties that benefitted, either as a lump sum or in installments. In 2005, the City discontinued the Barrett Law method in favor of a new system that imposed less of a financial burden on property owners. As part of this transition, the City passed a resolution discharging all Barrett Law assessments owing as of November 1, 2005, but did not give refunds to those property owners who had previously paid their Barrett Law assessments, including the plaintiffs. When the refund request was denied, the plaintiffs brought a Section 1983 action alleging that the City violated their federal constitutional rights to due process and equal protection under the Fourteenth Amendment. The trial court entered judgment against the City; on appeal, the Supreme Court of Indiana reversed, finding that, on application of rational basis review, the law was rationally related to legitimate governmental interests and survived constitutional challenge. The question before the U.S. Supreme Court is whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who paid their assessments in full, while forgiving the obligations of identically-situated taxpayers who chose to pay using a multi-year installment plan.

*Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010), *petition for cert. filed* (U.S. Feb. 14, 2011) (No. 10-1032). The plaintiffs, owners of rental properties, brought an action claiming that the City of St. Paul's enforcement of its housing code was discriminatory, being based on the large percentage of minority tenants in their properties, and violated the Fair Housing Act. As evidence, they cited statements made by the relevant City official indicating his desire and intent to reduce the amount of low-income tenants in the City. The district court granted the City's motion for summary judgment; on appeal, the Eighth Circuit affirmed with the exception of the owners' disparate impact claim, which was reversed. It was reasonable to infer that racial minorities, particularly African-Americans, were disproportionately affected by these events. The question for the U.S. Supreme Court is whether disparate impact claims are cognizable under the Fair Housing Act; if so, which test should be used to analyze them? IMLA has filed an *amicus* brief in this case.

As mentioned in a recent IMLA Newsletter, the Court has agreed to hear the appeal in *Filarsky v. Delia*, 621 F.3d 1069 (9th Cir. 2010), *cert. granted*,

2011 U.S. LEXIS 5204 (U.S. Sept. 27, 2011) (No. 10-1018), on the question of whether outside counsel, retained to work with city employees to conduct an internal affairs investigation, was precluded from asserting qualified immunity solely because of his status as a private lawyer and not that of a government employee. In that case, the attorney, Filasky, acting on the instructions of the fire chief, ordered the plaintiff firefighter to produce certain items at his home for inspection. The plaintiff alleged this was a violation of his Fourth and Fourteenth Amendment rights. The Ninth Circuit found Delia's constitutional right under the Fourth Amendment, to be protected from a warrantless, unreasonable compelled search of his home, was violated. However, because this right, under these or similar facts, was not clearly established at the time of the constitutional violation, it affirmed the district court's order granting qualified immunity to the individual City defendants, but reversed the grant of qualified immunity to Filarsky and remanded. The appellate court stated it was bound by circuit precedent, *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), where the Ninth Circuit had ruled a private attorney representing a county was not entitled to qualified immunity. M.

## Lawyer's Conundrum

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client is a corporation); MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D 241, 248 (W.D.N.Y. 2009) (privilege attaching to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation and not to the individual employee).

14. Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) ("There is no logical reason to distinguish partnerships from corporations or *other legal entities* in determining the client a lawyer represents.") (emphasis added).

15. Geoffrey C. Hazard, Jr, *Symposium: Legal Ethics for Government Lawyers: Straight Talk For Tough Times: Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 215-217 (2000).

16. There is a general duty in public service calling upon government employees and agencies to favor disclosure over concealment. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997) ("We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.").

17. United States v. Norris, 722 F. Supp. 2d 632, 637 (E.D. Pa. 2010). *Norris* lays out in excellent detail the five-part test from *In the matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), for determining whether or not a private individual can claim attorney-client privilege, noting that the person claiming the privilege has the burden of proving the existence of each element of it.

18. For an individual to claim a privilege based on communications with corporate counsel, the individual corporate officer must indicate to the attorney that the advice sought is sought in his individual capacity. United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999) ("Absent an indication that the lawyer should act in a capacity other than that of the company's lawyer, a corporate officer will not have a privilege"). *See also*, In re Grand Jury Proceedings, 570 F.2d 562, 563 (6th Cir. 1978), *aff'g* 434 F. Supp. 648, 650 (E.D. Mich. 1977) (court requires that the individual officer seeking a personal privilege clearly claim that he is seeking legal advice in his individual capacity).

19. Gregory W. Stepanicich, *supra* note 4. M.

## Inside Canada

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indicating changes to that Act. A preamble was needed to set out "broad overarching principles;" the Act should be extended to include "private interests" beyond the existing "pecuniary interests" covered by the Act; and the MCIA should be extended beyond the legislative and deliberative functions of a municipal council (for example, to apply to all meetings attended by council members in their official capacities). In addition, the conflict of interest sanctions in the MCIA needed to include lesser sanctions: suspensions and a form of probation for an elected member, a reprimand publicly made by a judge, and a requirement for a formal apology by the member. Standing to being action under the MCIA should be broadened, and, in the interest of procedural fairness, the Act should explicitly state that members were able to make submissions regarding findings in integrity commissioners' reports or a recommendation that a penalty be imposed under a municipality's own code of conduct. "I make these findings with a measure of regret, having regard to the mayor's unique history of public service," Justice Cunningham noted, but he concluded that all of Ontario's municipalities require "a better ethical infrastructure."

It remains to be seen to what extent the Ontario legislature (and that of any other province) incorporates these or similar recommendations into amended municipal legislation. Copies of the 386-page Report are available online at http://www.mississaugainquiry.ca. M.

